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IN THE

Supreme Court of the United States

October Term, 1966

No. 490

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO., FEDERAL MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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August 26, 1966

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Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners respectfully pray that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York dated June 2, 1966.

Opinions Below

The final order of the Court of Appeals of the State of New York affirmed, without opinion, an order of the New York Supreme Court, Appellate Division, First Department, entered on November 23, 1965, affirming, on the opinion below, a final judgment of the New York Supreme Court, Trial Term, for plaintiff, entered on March 18, 1965. Said final order of the Court of Appeals of the State of New York also affirmed, without opinion, a prior order of the New York Supreme Court, Appellate Division, First Department, entered on April 30, 1964, affirming, on the opinion below, an order of the New York Supreme Court, New York County, Special Term, entered on September 16, 1963, granting plaintiff's motion to strike defendants' sixth affirmative defense. The opinion of Special Term is reported at 42 Misc. 2d 939 and at 249 N. Y. S. 2d 481, and is set forth as Appendix A hereto at page 1a. The opinion of Trial Term on damages is reported at 48 Misc. 2d 397 and at 265 N. Y. S. 2d 76, and is set forth as Appendix B hereto at page 8a. This petition is concerned with the opinion of Special Term of September 5, 1963 striking the sixth affirmative defense (A55; Appendix A hereto, page 1a), as affirmed by the final order of the Court of Appeals dated June 2, 1966 (Appendix E hereto, page 53a).

Jurisdiction

The final order of the Court of Appeals of the State of New York was rendered on June 2, 1966 and was entered in the New York County Clerk's office on June 9, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

Question Presented

May a state court award a money judgment for breach of contract in the face of an affirmative defense alleging that the contract is unenforceable because it imposes a tie-in arrangement on defendants that is illegal *per se* under Section 1 of the Sherman Act, where (a) the state court has not adjudicated the illegality of the contract under the Sherman Act; (b) enforcement of the contract would carry out the tie-in and require defendants to pay damages for refusing to take unwanted products; (c) defendants have not received title, use or benefit of any of the products for which payment is sought; and (d) a U. S. District Court had previously held in an action between the same parties that the same allegations set forth a *per se* violation of the Sherman Act?

Statute and Constitutional Provision Involved

The question just stated raises two distinct federal issues. The first arises under Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282; 15 U. S. C. §1. The pertinent portion of Section 1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

The second federal issue put by the above question arises under Article VI, Clause 2, of the U. S. Constitution,

the Supremacy Clause, which provides in pertinent part as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Statement of the Case

The stricken affirmative defense alleged in substance that petitioner insurance companies (hereinafter "Kemper") were coerced by respondent (hereinafter "ABC") into buying television advertising time on 35 television stations in undesired markets as a condition of acquiring sponsorship rights on the ABC program "Evening Report" and commercial television time on 95 stations in desired markets. In short, the defense attacks the tying together by the network of television stations on the network line-up so as to require an advertiser to buy all or none.

The contract that is the subject of this law suit was dated August 15, 1962. It provided for sole sponsorship by Kemper of the 15 minute television news program, "Evening Report", over 130 specified stations affiliated with ABC one day per week, on alternate Wednesdays and Fridays, for the 26 quarter-hour telecasts commencing October 17, 1962 and ending April 12, 1963 (Complaint, Ex. A. ¶¶1-2, A13-A14; Appendix F hereto, pages 59a-

60a).* On November 13, 1962, after 4 of the 26 telecasts had been broadcast under Kemper sponsorship, Kemper cancelled its sponsorship of the remaining 22 telecasts of "Evening Report," containing 55 commercial minutes, scheduled for the period from November 14, 1962 to April 12, 1963 (A380-A381; Appendix B hereto, pages 8a-9a).

This action was instituted by ABC on January 9, 1963. ABC sought damages for each of the 55 cancelled minutes, i.e., for the unperformed portion of the contract.** (A9-A12; Appendix F hereto, pages 56a-58a).

The sixth affirmative defense in Kemper's answer alleges in substance that the contract in suit is *per se* illegal as a tie-in violation of the Sherman Act (Answer ¶¶76-79, A41-A42; Appendix G hereto, page 88a). Specifically, it alleges that: (1) in 1962, the geographical pattern of Kemper's sale of insurance was such that it was desirable for Kemper to advertise by television in 95 specified market areas but not in 35 additional and different market areas served by television stations affiliated with ABC (Answer ¶¶53, 73, 75; A30-A31, A40-A41; Appendix G hereto, pages 76a-77a, 86a-88a); (2) ABC refused to permit Kemper to sponsor "Evening Report" or to advertise over the 95 desired stations unless Kemper also sponsored "Evening Report" over the 35 undesired stations (Answer ¶75, A40-A41, Appendix G hereto, pages 87a-88a); (3) the tie-in was

* Kemper used the printed appendix system on appeal to the New York Court of Appeals. References to that appendix contain the prefix "A" (e.g. A13-A14). Pages in the Appendices to this petition contain the suffix "a" (e.g. pages 59a-60a).

** Only the second cause of action is involved here. In its first cause of action ABC sought recovery for a single segment of the performed portion of the contract.

accomplished by requiring Kemper to pay a non-cost-justified penalty rate for the 95 stations that far exceeded the rate at which ABC offered the 130 station line-up which, of course, included the 95 stations (Answer ¶75, A40-A41; Appendix G hereto, pages 87a-88a); and (4) ABC was able to impose this tie-in by means of the control it had over its affiliated television stations and by means of its control over the sponsorship rights to the "Evening Report" program (Answer ¶¶69, 70, 74; A38-A40; Appendix G hereto, pages 84a-86a).

The contract itself lists the entire 130 stations consisting of the 35 unwanted stations and the 95 wanted stations and designates the market areas in which they are located (A22-A25; Appendix F hereto, pages 68a-71a). The unwanted market areas are specified in Exhibit B to the answer (A48; Appendix G hereto, page 93a).

Simultaneously with the service of this answer Kemper instituted in the United States District Court for the Southern District of New York a suit against ABC alleging that the contract upon which ABC had premised this state court suit was illegal as a *per se* violation of Section 1 of the Sherman Act. The allegations of the complaint in the federal suit were practically identical to the allegations of the sixth affirmative defense of the answer in this suit.

Thereafter ABC moved to dismiss the complaint in the federal suit on the ground of failure to state a claim. On August 14, 1963 the District Court denied ABC's motion (*American Manufacturers Mutual Insurance Co.* v. *Amer-*

ican Broadcasting-Paramount Theatres, Inc., 221 F. Supp. 848 [S. D. N. Y. 1963]; Appendix C hereto, page 27a). In its opinion the District Court reviewed the applicable authorities, including *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958), and concluded that Kemper had alleged a violation of Section 1 of the Sherman Act and that this violation came within the *per se* rule recognized in *Northern Pacific*. It held:

(a) that "[t]hirty-five undesirable stations are not the same as 95 desirable stations. Nor are 35 additional stations the same product as the sponsorship of a unique program." (p. 850; Appendix C hereto, page 29a);

(b) that the program, "Evening Report," is of a sufficiently unique nature to satisfy the requirement of a sufficiency of economic power over the tying product prescribed in *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958) (p. 850; Appendix C hereto, page 31a);

(c) that proof that ABC tied the clearance of its "Evening Report" program over its affiliates to acceptance by those affiliates of the sponsor provided by ABC was also material under *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) and *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958), to show that ABC had the requisite economic power in the tying product (the commercial time of the 95 desired stations) to impose the tie-in (p. 851; Appendix C hereto, page 31a); and

> (d) that, if ABC made the program over 95 desired stations available only at a disproportionately high price, this would be the equivalent of conditioning the sale of the tying product to purchase of the tied product, and would be a violation of the Sherman Act (p. 851; Appendix C hereto, p. 31a).

Less than a month after the District Court's decision, the New York Supreme Court, Special Term, by opinion dated September 5, 1963, struck from Kemper's answer the allegations sustained by the District Court as alleging a *per se* violation of Section 1 of the Sherman Act (42 Misc. 2d 939; A7; Appendix A hereto, page 1a). The state court's decision did not mention or refer to the District Court's decision. The antitrust defense was stricken without adjudicating its merits, on the ground that there was a remedy, which it did not specify, available in the federal court. Special Term's opinion stated:

> "To grant plaintiff the judgment it asks with respect to the second cause of action would indeed require defendants to pay for broadcasts over some 35 stations which defendants say they do not want and which they say they were compelled to contract for as part of an illegal tying-in program by plaintiff." (A57; Appendix A hereto, pages 3a-4a)

The opinion then stated:

> "to disallow the defense would be consistent with the policy that enforcement of the Federal antitrust laws should in general be in the Federal courts only * * *." (A58; Appendix A hereto, page 5a)

Special Term also stated that in the federal court Kemper "if entitled to it, can get full relief" and noted that Kem-

per was seeking in the federal court a permanent injunction against prosecution of the state court action (A59; Appendix A hereto, page 5a). The order of Special Term was affirmed on appeal to the Appellate Division by order entered April 30, 1964 (20 A. D. 2d 890; A403; Appendix E hereto, page 44a).

Thereafter a trial was held on the issues raised by ABC's claim for $432,693.22. After trial, damages were assessed at $265,047.21 and judgment entered accordingly (48 Misc. 2d 397; A380; A65; Appendix B hereto and Appendix E hereto, pages 8a, 46a). This judgment was affirmed on November 23, 1965 on a second appeal to the Appellate Division (24 A. D. 2d 851; A401; Appendix E hereto, page 49a).

By order entered February 3, 1966 the Appellate Division unanimously granted leave to appeal to the Court of Appeals (A399; Appendix E hereto, page 51a). Under New York Civil Practice Law and Rules §5501(a), as construed in *DeLong Corp.* v. *Morrison-Knudson Co.*, 14 N. Y. 2d 346, 347 (1964), the appeal from the Appellate Division order of November 23, 1965 brought up for review the prior order striking the sixth affirmative defense and the Appellate Division order of April 30, 1964 affirming said order. On June 2, 1966 the New York Court of Appeals affirmed, without opinion, the order of affirmance of the Appellate Division, and the prior orders upon which the final judgment was based (Appendix E hereto, page 53a).

On August 1, 1966 Mr. Justice Harlan, in a three page opinion, granted Kemper's application for a stay of execu-

tion of ABC's judgment. On August 3rd a stay order was signed pursuant to the opinion of August 1, 1966 (Appendix D hereto, page 35a).

The action in the fedreal court has been diligently prosecuted by Kemper and has been assigned to District Judge Charles E. Tenney for all purposes, pursuant to Rule 2 of the Rules of the United States District Court for the Southern District of New York.

Reasons for Granting the Writ

1

The Decision Below is Not in Accord with Prior Decisions of This Court, is in Conflict with *Associated Press* v. *Taft-Ingalls Corporation*, 340 F.2d 753 (6th Cir. 1965), *Cert. Denied* 382 U. S. 820 (1965), and Enforces a Contract Embodying a *Per Se* Tie-In Violation of the Sherman Act, Which Entails Serious Anti-Competitive Consequences for Television Advertisers and Television Stations in Dealing with Television Networks.

First: The alleged tie-in is a per se violation of Section 1 of the Sherman Act.

The decisions of this Court in *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962), *Northern Pacific R. R. Co.* v. *United States*, 356 U. S. 1 (1958), and *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), establish that the tying agreements are *per se* violations of the Sherman Act. The requisite elements of an illegal tie-in were laid down in *Northern Pacific*: (a) a sufficiency of economic power in the market for the tying product;

(b) a difference between the tying and tied products; (c) a conditioning of the sale of the tying product on purchase of the tied product; and (d) a not insubstantial amount of commerce involved. *Loew's* established that (a) the requirement for a sufficiency of economic power may be satisfied by the unique character of the tying product and (b) the conditioning or tie-in could be effected by a non-cost-justified price differential. We submit that a most cursory reading of the sixth affirmative defense shows that all four elements of an illegal tie-in are, as the District Court has determined, sufficiently expressed (sufficiency of economic power ¶¶69, 70, 71, 74, 75; not insubstantial amount of commerce ¶¶10, 11, 52-55, 70-79; product difference ¶¶53, 71, 73, 75, Exhibits A and B; conditioning ¶75; see Appendix G hereto, pages 72a-96a).

That the alleged network practice of tying all the stations together on a network line-up falls within the proscription of *Loew's* and *Northern Pacific* has been expressly recognized by informed antitrust commentators. In a statement before the Senate Interstate and Foreign Commerce Committee, Professor (now Assistant Attorney General) Turner dealt with the "must-buy" practice, under which the network requires an advertiser to purchase broadcast time on a designated line-up of stations as a condition for obtaining broadcast time on any stations. He stated:

> "[T]he 'must-buy' arrangements * * * foreclose independent TV stations from access to programs, and again foreclose small advertisers from an opportunity to purchase prime television time. Again we would conclude that, even apart from the movie cases—I

mean just on general antitrust principles—this would be clearly an unreasonable restraint of trade.

"We believe that under the movie cases these practices would be unreasonable per se; as I said, no question of business justification would come in." (*Television Inquiry,* Hearings Before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2nd Sess. [1956], at p. 1559)

Professor Schwartz, in an article in the University of Pennsylvania Law Review, said:

"Moreover, the 'must buy' practice clearly seems to come within the broad proscription of 'tying arrangements' recently enunciated by the Supreme Court in *Northern Pac. Ry.* v. *United States.*" (Schwartz, *Antitrust and The FCC: The Problem of Network Dominance,* 107 U.Pa.L.Rev. 753, 779 [1959])

In 1958 a House Commerce Committee Report described the "must buy" practice in the following terms:

"A network employing the 'must buy' practice imposes the requirement that the advertiser take a 'second commodity' (one or more unwanted basic stations) in order to obtain the wanted 'tying' product (those network affiliates in markets desired by the advertiser). Since the 'must buy' practice does require the advertiser to purchase all of the basic stations in order to gain access to the network, those stations basic or optional, wanted by the advertiser, constitute the dominant 'tying' product under the Northern Pacific rationale. * * * This practice would thus seem to fit squarely within the Northern Pacific 'tie-in' formula." (*Network Broadcasting,* Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. 1297, 85th Cong., 2d Sess. [1958], at p. 512)

The decision of the District Court of August 14, 1963 in Kemper's federal court suit is but the logical and inevitable consequence of applying the rules and principles laid down in *Northern Pacific* and *Loew's*. The opinion of informed commentators that "must buy" violates Section 1 of the Sherman Act is confirmed by an analysis of the anti-competitive consequences of the practice.

Second: The serious anti-competitive consequences to television advertisers and to television stations of the tie-in alleged in the sixth affirmative defense.

A brief summary of the anti-competitive consequences of the practice described in Kemper's affirmative defense demonstrates the truth of this Court's observation: "Tying agreements serve hardly any purpose beyond the suppression of competition" (*Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306 [1949]).

It has been more recently noted in Blake and Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 Yale L. J. 1339, 1349 (1965), that network tie-ins may "distort or impair competition in the markets for the products involved."

(a) The first and most obvious restraint resulting from the alleged tie-in is to coerce the buyer into buying what he does not want in order to get what he does want. This self-evident consequence was recognized in a memorandum submitted by Professor Turner at the 1956 hearings before the Senate Commerce Committee, which reads:

> "[U]nder the networks' coercive must-buy policy, the major advertiser must buy the time of network af-

filiates both in markets in which the advertiser is not interested and in markets where the advertiser would prefer a non-network station." (*Television Inquiry*, Hearings before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. [1956] at p. 1538.)

(b) The buyer's only alternative to a coerced tie-in purchase is not to buy at all. The choice to buy all or none poses a serious dilemma, particularly for the regional advertiser. If he buys none, he foregoes the choicest television time in favor of his competitor. If he buys all he is forced to advertise where he does not sell. The result, either way, is to place him at a disadvantage with his national competitor. That this is not an abstraction but a very real problem in the most contemporary sense is shown by the current hearings before the Senate Antitrust and Monopoly Subcommittee on TV Advertising Discrimination.

For example, the advertising manager of Hudepohl Brewing Company of Cincinnati, Ohio, stated before the Senate Subcommittee on May 26, 1966 that the ABC network refused to sell Hudepohl the desired regional network and instead offered a different line-up which included four markets in which Hudepohl had no distribution. He also stated that the practices of the networks "tend to eliminate smaller regional breweries as advertisers. By continually putting the smaller regional breweries at an opportunity and dollar buying disadvantage and awarding this advertising advantage to larger breweries, the networks discriminate and will eventually cause the downfall of smaller regional advertisers." (This testimony is reported in part in BNA, Antitrust & Trade Reg. Rep. No. 255 [May 31, 1966], at p. A-3.)

The Federal Trade Commission has recognized the competitive advantages which large national advertisers have over their smaller regional competitors in acquiring prime commercial time from television networks. (*The Procter & Gamble Co.* [Docket No. 6901], 3 Trade Reg. Rep. [1963-1965 Transfer Binder], ¶16673 [FTC 1963]). The FTC concluded that this advantage created an incentive toward conglomerate mergers that could not be justified by economies of operation. The FTC decision was reversed on other grounds (*Procter & Gamble Company* v. *FTC,* 358 F. 2d 74 [6th Cir. 1966], *cert. granted,* 35 U. S. L. Week 3044 [U. S. July 19, 1966]).

A recent study of the anti-competitive effects of network tying arrangements and price discrimination has noted the high degree to which network advertising is concentrated among a few large advertisers. The study pointed out that although some $2,062,000,000 was spent in 1963 on television programs and commercials, three-quarters of all television network advertising revenue was derived from the top 50 advertisers (Blake & Blum, *Network Television Rate Practises: A Case Study in the Failure of Social Control of Price Discrimination,* 74 Yale L. J. 1339, 1345-1346 [1965]). The Antitrust Subcommitte of the House Committee on the Judiciary stated in 1957:

> "Advertiser acceptance of the requirement ["must buy"] in these circumstances means in sum that the network has used its network position as a lever to require the advertiser to take not only stations that he wants but also stations that he does not want. In these circumstances, only very large national advertisers are willing to use network television as a commercial medium, as evidenced by that fact that about 50 per

cent of the dollar volume of all network time sales is controlled by 25 concerns." (*The Television Industry*, H.R. Rep. 607, Report of Antitrust Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess. [1957], at p. 86)

(c) The impact of the "must buy" practice is not limited to the regional advertiser. The local advertiser who wishes to buy time connected with a network program over a local affiliate may be foreclosed from dealing directly with the affiliate and as a practical matter from buying the time at all. Where the network appropriates the time of an affiliate and sells it to an advertiser as part of the network lineup, that time is of course no longer available to the affiliate for sale to the local advertiser (Answer ¶¶63, 68, 69; A34-A35, A37-A38; Appendix G hereto, pages 80a-81a, 83a-85a). In those instances where the local advertiser wishes to advertise on an affiliate not wanted by the network advertiser but coercively purchased by the latter, the result is that the time is applied to an unwanted and unneeded use instead of to a needed and wanted use.

(d) The restrictive impact of the network's "must buy" or tie-in practice extends to the network's affiliates. In every case where the network appropriates the affiliate's time to fulfill a "must buy" contract with an advertiser, the affiliate is foreclosed from selling that time directly (Answer ¶¶63, 68, 69; A34-A35, A37-A38; Appendix G hereto, pages 80a-81a, 83a-85a). Not only does this remove the affiliate from the local advertising market but also removes the affiliate from the national spot market and to that extent limits competition between the affiliate and the network for the national or regional advertising

dollar (Answer ¶¶63, 68, 69; A34-A35, A37-A38; Appendix G hereto, pages 80a-81a, 83a-85a). The F. C. C. has recognized that affiliates compete with networks through the national spot market and has recognized the importance of maintaining that competition (*Network Representation of Stations in National Spot Sales* [F. C. C. Dkt. No. 12746], 27 F. C. C. 697 [1959]). The Commission there forbade networks to act as agents for their affiliates in selling their time on the national spot market.

(e) Under the "must buy" practice the affiliated station may be foreclosed from selling to the regional advertiser who wants to advertise on that station but who is unwilling to take and pay for the entire network line-up, including stations in markets where he does no business. Thus, the memorandum submitted by Professor Turner at the "Television Inquiry" states:

> "By affiliating with a network company which has the must-buy policy, an affiliated station in Louisville in effect agrees that it will not carry any program, no matter how desirable, unless the sponsor or owner of the program purchases time through the network company not only on the Louisville station but on the fifty-odd other stations throughout the country included on the network's must-buy list. It is difficult to see how such a naked tie-in agreement, which would be clearly illegal in any other industry, is justified by the facts of the television broadcasting industry." (*Television Inquiry*, Hearings before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. [1956], at p. 1534)

Professor Turner also noted that the "must buy" practice forecloses competition from the independent stations

located in the same market areas as the unwanted stations. Thus the Turner memorandum states:

> "[T]he network companies illegally compel advertisers to purchase time on a must-buy list that includes both strong and weak stations, to the detriment of the independent stations competing with the weaker network stations, and of advertisers who cannot afford to pay for such a large package." (*id.* p. 1521)

The Antitrust Subcommittee of the House Judiciary Committee has reported:

> "Another effect of 'must buy' is to place the independent station at a distinct competitive disadvantage vis-a-vis the network affiliate operating in the same market." (*The Television Industry,* H. R. Rep. 607, Report of Antitrust Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess. [1957], at p. 86)

Third: Under the decisions of this Court, the ABC-Kemper contract should not be enforced.

We submit that the illegality of the alleged tie-in is clear, and its anti-competitive consequences to television advertisers and stations are of serious moment. We come now to the impact of the tie-in arrangement on the enforceability of the contract of August 15, 1962, which obligated Kemper to sponsor "Evening Report" over the 35 unwanted stations together with the 95 wanted stations.

The contract lists both the wanted and the unwanted stations and requires Kemper to pay for both. It is the contract which perfects the tie-in of the 35 unwanted stations to the 95 wanted stations. It is the contract which

carries out the tie-in, and consummates the other anti-competitive consequences enumerated above. It is only through enforcement of the contract that ABC can reap the fruits of its coercion. Thus the restraint is not collateral to, or separable from, the contract, but inheres in the contract. Kemper's answer expressly alleges the anti-competitive consequences that would flow from enforcement of the contract (¶¶79, 81, 82; A42-A43; Appendix G hereto, pages 88a-89a).

This contract is, we submit, a classic example of the type that the courts have refused to enforce. It has long been established that illegal agreements will not be enforced. This policy had its origin in the earliest period of the common law (*Anonymous-"Dyer's" Case,* Y. B. 2 Hen. V, f. 5, pl. 26 [1415]). This Court has expressly recognized this policy in *McMullen* v. *Hoffman,* 174 U. S. 639 (1899), at p. 654:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards *carrying out* the terms of an illegal contract." (Emphasis added.)

The declaration in Section 1 of the Sherman Act that "[e]very contract * * * in restraint of trade * * * is declared to be illegal" was a reaffirmation of this policy that unlawful contracts in restraint of trade should not be enforced. *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 279-291 (6th Cir. 1898), mod., 175 U. S. 211 (1899).

Numerous decisions of this Court have reaffirmed that basic policy.

In *Continental Wall Paper Co.* v. *Louis Voight & Sons,* 212 U. S. 227 (1909), this Court refused to enforce a contract for the agreed price of goods sold and delivered where the sales account "was made up * * * with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized." This Court thus distinguished *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540 (1902), holding simply that the illegal organization of plaintiff did not itself render its contracts unenforceable. For other cases holding agreements unenforceable because of antitrust illegality, see *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373 (1911); *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8 (1918); *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346 (1922); *Sola Electric Co.* v. *Jefferson Co.,* 317 U. S. 173 (1942); *Katzinger* v. *Chicago Metallic Mfg. Co.,* 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Co.,* 329 U. S. 402 (1947).

In *Kelly* v. *Kosuga,* 358 U. S. 516 (1959), this Court held that an oral conspiracy to raise prices by withholding onions from the futures market was separable from a completed sale of 50 carloads of onions and therefore did not render the promise to pay the agreed price for the sold onions unenforceable. Nevertheless this Court recognized *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.,* 212 U. S. 227 (1909), as the "leading case", where judgment for the plaintiff had been denied because such a judgment would "make the courts a party to the *carrying out* of one of the very restraints forbidden by the Sherman Act." (Emphasis added.) This Court went on to state the test of unenforceability as follows:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" (358 U. S. at 520)

The rationale of the defense of illegality under the antitrust laws was given as follows in *Continental Wall Paper Co.* v. *Louis Voight & Sons,* 212 U. S. 227 (1909), at p. 262:

> "In such cases the aid of the Court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."

Here enforcement of the contract would carry out the illegal tie-in, would give the wrongdoer the fruits of its coercive policy, would sanction the serious anti-competitive consequences, not only to Kemper but to others in the industry, and would fly in the face of the strong federal policy reflected in Section 1 of the Sherman Act. The remedy of unenforceability will effectively vindicate not only Kemper's rights but will also protect against the anti-competitive consequences to others. It is noteworthy that the only federal case involving the effect of a tie-in arrangement on the enforceability of a contract has held the contract to be unenforceable (*Associated Press* v. *Taft-Ingalls Corporation,* 340 F. 2d 753 [6th Cir. 1965], *cert. denied* 382 U. S. 820 [1965]). Moreover here recognition of Kemper's antitrust defense would not result in Kemper's acquiring "other people's property for nothing." The only issue here relates to Kemper's liability for the 55 commercial

minutes following cancellation on November 13, i.e., the unperformed portion of the contract.

The decision below is squarely at variance in several particulars with the rules articulated in the many decisions of this Court cited above. (1) It is clear that the illegality need not appear "on the face" of the contract for the contract to be unenforceable. In neither *Continental Wall Paper Co.* nor *Associated Press* did the illegality appear on the face of the contract. In *Sola Electric Co., Katzinger* and *MacGregor,* the illegality turned on the extrinsic fact that the patent was invalid. (2) The consequence of inherent illegality is unenforceability (see cases cited p. 20 *supra*), not the necessarily metaphysical "proportionment" of the penalty to the wrong, as proposed by the court below (A58; Appendix A hereto, page 4a). (3) The notion that a state court need not enforce federal law is, to say the least, novel. But more as to this below. (4) The court's reliance on *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743 (1947) is misplaced. That was a suit by a manufacturer on promissory notes given by a buyer for the balance owed for cans sold and delivered, in which defendant buyer asserted that the manufacturer had engaged in price discrimination against it in violation of the Robinson-Patman Act, 15 U. S. C. §13. Two distinctions between this and the instant case are thus immediately apparent. (a) The defendant in *Bruce's Juices* was seeking to avoid payment for what it had already received, whereas in the instant case ABC is seeking to recover for post-cancellation programs that were not broadcast under Kemper sponsorship. This precise distinction is the "overriding general policy"

by which this Court has stated the courts are to be guided (*Kelly* v. *Kosuga*, 358 U. S. 516, 520-521 [1959]). (b) In *Bruce's Juices* illegality was not under the Sherman Act, but under the Robinson-Patman Act. This Court therefore noted that the illegality could not inhere in the contract because it took at least two separate transactions to constitute a price-discrimination violation under that Act. This Court also noted that "the entire basis for judging under the two Acts [Sherman Act and Robinson-Patman Act] is different" (330 U. S. at 755-756).

Fourth: The decision below is in conflict with* Associated Press *v.* Taft-Ingalls Corporation, *340 F.2d 753 (6th Cir. 1965), cert. denied 382 U. S. 820 (1965).

Review by the Supreme Court is necessary in order to resolve the conflict between the decision of the New York Court of Appeals rejecting the antitrust defense to a tie-in contract claim and the decision of the Court of Appeals for the Sixth Circuit in *Associated Press* v. *Taft-Ingalls Corporation*, 340 F. 2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 (1965), upholding the antitrust defense to a tie-in contract claim.

In the *Associated Press* case the Associated Press had brought suit for payment due under a contract for the furnishing of four separate wire news services to a newspaper owned by defendant Taft-Ingalls. The contract required two years' notice of cancellation. The newspaper had contracted for the four wire services in 1948 at a single package price for all four wires. In 1957 Taft-Ingalls, in an effort to reduce costs, asked that its newspaper be

furnished only one of the four wire services. The Associated Press refused this request and insisted that the paper could obtain the desired wire only by taking the entire package of four wires at the package price. In 1958 the newspaper cancelled the contract without giving the required two years' notice. Associated Press sued for the agreed contract price for the four wires for the unexpired two-year period. Taft-Ingalls defended the suit on the ground that the Associated Press had made its four wire services available only as a single package, a *per se* tie-in violation of the Sherman Act. The court upheld the defense on appeal, in reliance on this Court's decision in *Kelly* v. *Kosuga,* 358 U. S. 516 (1959), on the ground that to give judgment on a tie-in contract would be to "carry out" and enforce the very restraint made illegal by Section 1 of the Sherman Act.

These cases are virtually indistinguishable. Both involve contracts to furnish interstate communications services, or rights relating thereto, over a period of time. In both cases the plaintiff seeks to recover for the period after defendant has cancelled the contract. In neither case does the illegality appear "on the face" of the contract. In both cases the extrinsic fact had to be established that the unwanted products were in fact unwanted. In both cases the defense was asserted that the contract is a tie-in violation of the Sherman Act. Although the decision of the New York Court of Appeals was rendered after the decision and opinion in *Associated Press,* that court did not attempt to reconcile its decision with that of the Sixth Circuit. It is apparent that they are irreconcilable, and that the conflict should now be resolved by this Court.

2

Under the Supremacy Clause the State Court was Not Free to Reject the Defense of Illegality and Proceed to Judgment Prior to an Adjudication of the Antitrust issues.

The New York courts have proceeded to judgment in the face of and without awaiting adjudication of the issues raised by Kemper's defense of antitrust illegality. The antitrust defense has been stricken on the ground that "enforcement of the Federal antitrust laws should in general be the Federal courts only" and on the ground that in the federal court Kemper "if entitled to it, can get full relief" (A58-A59; Appendix A hereto, p. 5a). The state courts also stated that there was an advantage in not litigating the antitrust issues in two courts (A59; Appendix A hereto, p. 5a).

It is, of course, clear that the enforceability of a contract alleged to be in violation of the Sherman Act is a matter of federal law. Thus, in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959) this Court said at p. 519:

> "[T]he effect of illegality under a federal statute is a matter of federal law, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176, 177 • • • ."

See also *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88 (1902).

Any state policy against recognition of the defense of antitrust illegality must, of course, give way to the federal policy against enforcement of contracts in restraint of trade. Thus, this Court stated in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942) at p. 176:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its bene-

> fits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. * * * [T]he doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. * * * [Citing authority] When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. *To the federal statute and policy, conflicting state law and policy must yield. Constitution Art. VI, cl. 2*; * * *." (Emphasis added.)

It has long been established by this Court that a state court may not refuse to adjudicate federal issues. Thus, this Court said in *Claflin* v. *Houseman,* 93 U. S. 130 (1876), at p. 137, that a state court:

> "* * * is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Subsequently, in *Mondou* v. *New York, New Haven & Hartford R. R. Co.,* 223 U. S. 1 (1912) (Second Employers' Liability Cases) this Court held that a state court

must enforce a federal right even though that right is not in accord with the policy of the state and even though it might be inconvenient and confusing for the state court to apply federal law. See also *Testa* v. *Katt*, 330 U. S. 386 (1947) and *McKnett* v. *St. Louis & San Francisco Ry.*, 292 U. S. 230 (1934).

The reasoning of these decisions, that state courts may not refuse to adjudicate federal issues, applies as well where the federal law is raised in defense as where it creates the cause of action. Thus, Professor Loss has stated in Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249, 1255 (1960):

> "[A] state court's refusing to entertain a *defense* of federal illegality is a graver error than its refusing to accept jurisdiction which is given it over federal *claims*." (Emphasis in the original.)

See also Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 507 (1954).

In *Anderson* v. *Carkins*, 135 U. S. 483 (1890), the Nebraska court, in an action for specific performance of a contract to sell land, had stricken an affirmative defense that the contract was illegal and unenforceable because in violation of the federal homestead laws. This Court reversed and held that the state court must recognize the defense of illegality under the federal statutes despite the existence of state policies and statutes favoring enforcement of the contract.

We submit that the course pursued by the state courts in this case is squarely at odds with these authoritative decisions.

Moreover, the reasons given by the state court for failing to adjudicate the federal issue here are without substance. It is entirely immaterial that Kemper does or does not have a complete remedy in some other court, since the reason for refusing to enforce illegal contracts is that they are against public policy (*Continental Wall Paper Co.* v. *Louis Voight and Sons,* 212 U. S. 227, 262 [1909]). This consideration is particularly significant here where the anti-competitive impact of the tie-in arrangement is not limited to Kemper alone.

Even if we should accept, arguendo, the reasoning in the state court decision, it does not lead to the conclusion there reached, *viz.*, that the state court should proceed to judgment before the antitrust issue is resolved. At most, the reasoning of the state court leads to the conclusion that a federal court is a better forum for the adjudication of the antitrust defense. But clearly it does not follow from this that the state court can proceed to judgment before the antitrust issue is decided. It could have awaited disposition by the federal court and thus eliminated any question of duplicatory litigation. *General Aniline and Film Corp.* v. *Bayer Co.*, 305 N. Y. 479, 485 (1953). Under the express holdings of this Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942); *Mondou* v. *New York, New Haven & Hartford R.R. Co.*, 223 U. S. 1 (1912) (Second Employers' Liability Cases); and *Anderson* v. *Carkins,* 135 U. S. 483 (1890), any inconsistent state rule must give way to the federal policy against enforcement of contracts made in violation of Section 1 of the Sherman Act. The action of the courts below effectively stifled without adjudicating the federal right

asserted in the antitrust defense. The course pursued is in plain disregard of the constitutional mandate that "the judges in every state shall be bound" by the laws of the United States.

Conclusion

For the foregoing reasons: (1) the decision of the court below is not in accord with the prior decisions of this Court, (2) the decision below is in conflict with the decision in *Associated Press* v. *Taft-Ingalls Corporation*, 340 F. 2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 (1965), (3) the tie-in practices alleged in Kemper's sixth affirmative defense have serious anti-competitive effects upon regional advertisers, local advertisers, and on affiliated television stations, (4) the sufficiency of Kemper's defense of illegality under the antitrust laws presents an important federal question relating to the enforcement of the antitrust laws, and (5) the action of the state court in proceeding to judgment without adjudicating the federal issue presented by the sixth affirmative defense raises important federal questions as to the proper function of state courts under the Supremacy Clause.

Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 26, 1966

APPENDIX A

Opinion of Mr. Justice Silverman Dated September 5, 1963 Striking Defense of Illegality Under the Sherman Act (42 Misc. 2d 939)

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., Plaintiff, *v.* AMERICAN MFRS. MUTUAL INSURANCE Co. et al., Doing Business under the Name of KEMPER INSURANCE COMPANIES, et al., Defendant.

Supreme Court, Special Term,
New York County, September 5, 1963

SAMUEL J. SILVERMAN, J. This is an action for breach of a contract by which defendants insurance companies by their agent defendant Clinton E. Frank, Inc. undertook to "sponsor" certain television programs entitled "ABC Evening Report" on plaintiff's television network and to pay plaintiff an agreed price therefor. At the end of the program of November 9, 1962, plaintiff caused to be broadcast a "promotional announcement" of a program conducted by Howard K. Smith, a television news commmentator, entitled "The Political Obituary of Richard M. Nixon". The Howard K. Smith program was broadcast on November 11, 1962, and one of the participants in the program was Alger Hiss, who had been convicted of perjury in a *cause célèbre* of our time. The appearance by Hiss on this program aroused considerable controversy. On November 14, 1962, defendants cancelled their sponsorship of the ABC Evening Report.

The first cause of action in the complaint is for the agreed unpaid price for the November 9 program. The second cause of action is for the breach with respect to programs after November 14.

Plaintiff has made motions under former rules 109 and 103 of the Rules of Civil Practice addressed to the answer,

as well as a motion for summary judgment under former rule 113 of the Rules of Civil Practice. These motions are disposed of as follows:

The sponsorship contract of August 15, 1962 between the parties is a binding bilateral contract for sufficient consideration. Accordingly, the first, second and third defenses in the answer are insufficient.

The promotional announcement of the Howard K. Smith show at the end of the ABC Evening Report was not a breach of either any express or any implied provisions of the contract. It was not a "commercial" or a "billboard" within the meaning of paragraph 11, nor an advertisement of a product or service competitive to defendants. The contract was not one for a sale of time but rather for advertising through sponsorship of the program. Furthermore, paragraph 8 of the contract provides that "one minute of program airtime must be lost before time charge credit will be issued." The promotional announcement of the Howard K. Smith show was a matter of a few seconds. The parties are apparently in agreement that under the custom of the industry the sponsorship of a quarter-hour program by an advertiser does not preclude a promotional announcement of this kind at the end of the sponsored show, which is what happened here. Accordingly, the fourth and fifth defenses and the first and second counterclaims based on the promotional announcement must fail.

The sixth defense in the answer is that the contract is unenforcible because in violation of the Sherman Act (U. S. Code, tit. 15, §1), and is part of a program of re-

straint of trade in violation of the Sherman Act. Among other things, the contract is attacked as an illegal tie-in sale whereby defendants were required to sponsor the show on 35 stations they did not want in order to get the sponsorship on 95 stations that defendants did want.

As to the first cause of action for the recovery of the agreed consideration for the broadcast of November 9, 1962, on which defendants' sponsorship was announced, and which took place before defendants' repudiation of the contract, it seems clear that the defense of violation of the Sherman Act is insufficient. I think the case is indistinguishable from the goods sold and delivered cases, in which the United States Supreme Court has held a defense of violation of the Sherman Act insufficient (*Kelly* v. *Kosuga,* 358 U. S. 516 [1959]; *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743 [1947]).

I hold the sixth defense also insufficient as to the second cause of action in the complaint, the action for breach of contract insofar as it relates to programs after November 9, and after the repudiation.

The latest test that the United States Supreme Court has stated is whether giving the judgment asked by plaintiff "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act" (*Kelly* v. *Kosuga, supra,* p. 520). Unfortunately, this test is not unambiguous as applied to the facts of the present case. To grant plaintiff the judgment it asks with respect to the second cause of action would indeed require defendants to pay for broadcasts over some 35 stations which defendants say they do not want and

which they say they were compelled to contract for as part of an illegal tying-in program by plaintiff. But in that respect, the situation seems not much different from *Bruce's Juices* v. *American Can Co.* (330 U. S. 743, *supra*) in which recovery of agreed purchase price was allowed even though it included the claimed discriminatory overcharge. On its face the contract is a perfectly valid one for sponsorship of the program on 130 stations. Any network contract must have some provisions as to what stations the program is to be carried on. On its face this is not a contract having for its very object one of the restraints forbidden by the Sherman Act; it is not a contract to fix prices, or to divide territories between competitors, etc.

The United States Supreme Court has said: "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court" (*Kelly* v. *Kosuga*, 358 U. S. 316, 518, *supra*). To allow it would be to create "a very strange class of private attorneys general" (*ibid.*, p. 520).

To allow the defense would involve that same quality of capriciousness that the Supreme Court found in *Bruce's Juices* v. *American Can Co.* (*supra*, p. 753) as the penalty, would not be proportioned to the injury, but rather to other factors having nothing to do with the policies of the antitrust laws, e.g., whether credit was extended or not, and how much; how many stations defendants wanted, and how many stations defendants did not want; at what point in the life of contract defendants chose to assert its illegality; how much of the contract was performed and how much still remained to be performed etc.

Appendix A

Although a contract may so violate the antitrust laws as to be unenforcible in the State courts (*General Aniline & Film Corp.* v. *Bayer Co.*, 305 N. Y. 479, 484-485 [1953]), to disallow the defense would be consistent with the policy that enforcement of the Federal antitrust laws should in general be in the Federal courts only (*Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 178 [1st Dept., 1948]). This consideration is particularly apropos where as here defendants are actually pressing a suit in the Federal court for relief under the antitrust laws. In that suit defendants, if entitled to it, can get full relief, bearing a rational relationship to the damage if any that they may have suffered. Incidentally, in that same suit defendants seek an injunction against the prosecution of the present suit. There is also an obvious advantage in not litigating these long drawn out and expensive antitrust questions in two courts. And while a decision by the Federal court can finally resolve the antitrust questions between the parties, the decision by the State court of these antitrust questions would probably not be binding on the Federal court (cf. *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184, 188 [C. A. 2d, 1955]).

The first partial defense in mitigation of damages is to the effect that plaintiff could have minimized its damages by negotiating other sponsorship and commercial announcement programs for the programs as to which defendants repudiated. This defense appears to be a valid one, but it goes, of course, only to the amount of damages.

If, as defendants allege in their second partial defense, the parties in substance agreed to a partial cancellation

of the contract for the balance of November and all of December 1962, that agreement would seem to be supported by mutual consideration in that each party was relieved of its obligations for that period. And such an agreement, being executed, is not invalidated by section 33-c of the Personal Property Law (*Velveray Corp.* v. *Jolo Plastics Corp.*, 19 A D 2d 69, 71 [1st Dept., 1963]). Accordingly, the second partial defense is sufficient on its face, and the affidavits present a triable issue of fact as to whether the alleged agreement was in fact made. This issue of fact does not go only to the question of amount of damages, but substantially affects the issue of breach. Even if this breach relates only to part of the contract, it is inseparable from the rest of the contract in such sense that judgment could not be given on the portion of the second cause of action relating to the period after December, 1962 separately from the judgment for the period before. As to the second cause of action, it is not "possible to divide the claims or cause of action so that an effective judgment can be rendered as to part, without mutilation of the whole" (see *Lowe* v. *Lowe,* 265 N. Y. 197, 203 [1934]).

As defendant Clinton E. Frank, Inc. acted only as agent for a disclosed principal, it is not liable on the contract.

Accordingly, the first, second, third, fourth, fifth and sixth defenses are stricken as insufficient under former subdivision 6 of rule 109 of the Rules of Civil Practice and subdivision (b) of 3211 of the Civil Practice Law and Rules. The motion to strike the first and second partial defenses is denied. The first and second counterclaims are

dismissed under former subdivision 5 of rule 109 of the Rules of Civil Practice and paragraph 7 of subdivision (a) of 3211 Civil Practice Law and Rules.

Summary judgment is granted in favor of plaintiff against all defendants except defendant Clinton E. Frank, Inc., as to the first cause of action, and plaintiff's motion for summary judgment is denied as to the second cause of action. Summary judgment is granted dismissing the complaint as to defendant Clinton E. Frank, Inc.

The motion to strike portions of the answer under former rule 103 of the Rules of Civil Practice is denied except that subparagraphs 8(a) through 8(f) and paragraph 87 of the answer are stricken.

Settle order on notice.

There appears to be no occasion for leave to amend. But if defendants desire to amend they may request leave on the settlement of the order, stating the proposed amendment, and setting forth evidence to show the defendants had good ground to support the proposed amendment as described in the last sentence of subdivision (e) of 3211 Civil Practice Law and Rules.

APPENDIX B

Opinion of Mr. Justice Geller Dated March 12, 1965 Solely on the Issue of Damages (48 Misc. 2d 397)

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. Plaintiff, *v.* AMERICAN MFRS. MUTUAL INSURANCE Co. et al., Defendants.

Supreme Court, Special and Trial Term, New York County, March 12, 1965.

ABRAHAM N. GELLER, J. This is an action for breach of a sponsorship contract brought by plaintiff, herein referred to as "ABC", against defendant insurance companies, collectively known as the Kemper Insurance Companies and herein referred to as "Kemper."

On August 15, 1962 the parties entered into a television network contract whereby Kemper agreed to sponsor one program per week of the ABC Evening Report news program over a 26-week period beginning October 17, 1962. On November 9, 1962, the fourth telecast under Kemper's contract, a "promotional announcement" was made at the end of the sponsored program and just before the scheduled time was up, regarding the Howard K. Smith program on November 11 entitled "The Political Obituary of Richard M. Nixon," evidently occasioned by his recent defeat in the contest for the California governorship. Alger Hiss appeared on that program and attacked Richard M. Nixon. This caused considerable public controversy.

Protesting the appearance of Hiss on the ABC-TV Network and, in particular, the promotional announcement at the close of its sponsored Evening Report program and referring to the numerous complaints received from its agents and policyholders, Kemper cancelled its participat-

ing sponsorship of Evening Report by telephone on November 13, 1962 and letter on November 14, 1962. ABC replied that same day that it intended to hold Kemper "fully responsible for any and all sums due and to become due to us under the terms of the agreement between us dated August 15, 1962."

On November 14, about the time of the exchange of these letters delivered by hand, Mr. Herbert Brownell, of counsel for Kemper, discussed the matter with James C. Hagerty, vice-president of ABC News, and suggested that he call James S. Kemper, Chairman of the Board of Kemper, a personal friend for many years, to see if they could work out "a reasonable solution of this whole problem." Mr. Hagerty then suggested, and Mr. Brownell agreed, that it would be advisable to have Thomas W. Moore, then vice-president of ABC in charge of its television network and now president of the network, join him in talking with Mr. Kemper over the telephone.

The nature and effect of the subsequent conversation with Mr. Kemper and of the ensuing conversations and acts of the parties will be more fully developed in the consideration of Kemper's second defense, interposed originally as a partial defense claiming that, as a result of these subsequent arrangements, Kemper was under no obligation for the seven programs from November 13, 1962 to December 31, 1962, and amended at the trial to assert it as a complete defense to ABC's claim for the entire remaining 22 weeks of the contract.

In that November 14 telephone conversation Mr. Moore proposed what the parties have characterized as a "hia-

tus'' during which there would be no Kemper commercials on Evening Report, with Kemper resuming its sponsorship thereafter. Mr. Kemper stated that he would submit the offer to his board for their consideration. Kemper claims that in a later talk on November 30, 1962 between Mr. Hagerty and Mr. Kemper, when Mr. Hagerty was inquiring as to what the board had decided and was informed that the board would not meet until shortly after the first of the year, there was an understanding and interpretation to the effect that Kemper was not to be obligated for the seven weeks of the ''hiatus'' period between November 13, 1962 and December 31, 1962. On January 4, 1963 Mr. Kemper advised Mr. Hagerty in effect that the board had decided against ''coming back on the program.''

ABC sued on January 9, 1963. Its first cause of action was for the unpaid amount of $19,818.43 due pursuant to the contract for the November 9, 1962 broadcast. Its second cause of action was for damages in the sum of $432,693.22 for Kemper's cancellation and breach ''on or about November 14, 1962'' of the sponsorship agreement. Kemper interposed an answer containing six complete defenses, two partial defenses, and two counterclaims.

ABC's motion to strike out the answer and for summary judgment was granted as to the first cause of action; all six complete defenses were stricken and the two counterclaims were dismissed as insufficient, the court noting with regard to the promotional announcement that it was in accordance with the custom of the industry; but held that there was a triable issue of fact as to whether the parties had made the alleged agreement asserted in the second partial defense as effectuating Kemper's nonlia-

bility for programs broadcast in the period from November 13, 1962 to December 31, 1962; and that the first partial defense merely asserted a claim for mitigation of damages (*American Broadcasting-Paramount Theatres, Inc.* v. *American Mfrs. Mut. Ins. Co.*, 42 Misc 2d 939, affd. 20 A D 2d 890).

The trial before this court thus dealt with the issue of the second partial defense and the question of ABC's damages for breach of the sponsorship contract. The court granted Kemper's trial motion to amend its pleading to assert that defense as a complete defense on the alleged ground that, by electing to sue exclusively on the basis of the original November 14, 1962 cancellation, which, according to Kemper, had been eliminated by the hiatus agreement, ABC had purportedly debarred itself from recovering even for the remaining 15 weeks of Kemper's sponsorship period between January 1, 1963 and April 12, 1963.

The court finds that no agreement of any kind was made during the so-called "hiatus" period but that there was merely an outstanding offer by ABC which was not accepted by Kemper. Furthermore, even assuming that there was a "hiatus agreement," it would have been at best only an executory accord, not a substitute or superseding agreement, and ABC would have had the choice upon nonperformance thereof to sue either on the accord or on the original obligation.

There was not a word of writing between the parties regarding the "hiatus." The agreement of August 15, 1962, it should be noted, provided that it shall remain as their understanding and agreement "until superseded or

amended by some other written document or documents signed by both parties."

In the telephone conversation of November 14, 1962 following Mr. Brownell's talk with Mr. Hagerty, Mr. Kemper complained of the great pressure Kemper was under from its agents and policyholders. Mr. Moore then suggested that Mr. Kemper reconsider his position regarding cancellation and permit the pressure to subside by taking a period of time during which there would be no Kemper commercials and then resume sponsorship. This proposal, although it would entail a substantial loss to ABC in view of the obvious difficulty in arranging for any sponsorship replacement in the brief time available during this off-season period, was made by ABC in an attempt to settle the dispute and avoid litigation.

Mr. Kemper testified that he replied: "If that's what you are offering, a hiatus, to put the thing on ice for the time being, I will see that it is promptly considered by our board." The "hiatus" has been referred to as a "cooling-off period" or "gap" or "interruption" in Kemper's sponsorship to permit the situation to "simmer down."

It is clear from the testimony of Moore and Hagerty that, although it was not explicitly stated in that form, the resumption of sponsorship after the hiatus period was intended to be for the entire unfulfilled period of Kemper's contract, i.e., 22 weeks, which, had ABC's offer been accepted, would then have run from the expiration of the hiatus period to a new termination date extending for a like period of time beyond the contract expiration date of April 12, 1963.

Kemper does not seriously dispute this view of the November 14 telephone conversation but contends that, in a subsequent meeting on November 30, 1962 between Mr. Kemper and Mr. Hagerty, the agreement set forth in Kemper's second partial defense was reached. It is there alleged that, in consideration of Kemper's undertaking to reconsider its decision not to sponsor any further programs, ABC agreed that Kemper would not be charged for the seven "Evening Report" programs for the balance of 1962 and Kemper "agreed to notify ABC shortly after January 1, 1963 whether Kemper would or would not sponsor the remaining 15 programs."

The November 30 meeting, upon which Kemper relies, does not support its contention that an agreement was reached, no less the agreement claimed by it. Mr. Hagerty told Mr. Kemper that he had come merely to ask when the board was meeting on the hiatus question and, when other questions were raised, stated that he knew nothing about "legal fields" and had no authority to talk about them. Mr. Kemper testified that during that meeting he said to Mr. Hagerty: "I assume that during this period our mutual obligations are waived or put on ice." It is on the account of that meeting given by James S. Kemper, Jr., that Kemper bases its claim. But his testimony indicates that there was no new or different understanding, merely an attempted clarification by his father of the November 14 telephone conversation. He testified: "My father said, 'Well, first of all, about this hiatus that you fellows have proposed, is it definitely understood that under no circumstances are we to be responsible for sponsoring the pro-

gram during the hiatus.'" Mr. Hagerty said: "That's right." Mr. Kemper continued: "That was my understanding of the telephone conversation that I had with you and what's his name the other day, and I wanted to make certain I understood this correctly." Mr. Hagerty's final words were: "You understand, if something can't be worked out here, this will go over to the legal people and I will be out of the picture completely."

It is obvious that Mr. Hagerty's "That's right" as to Kemper not being responsible during the hiatus period meant no more than that, since there were no Kemper commercials during the hiatus, it would not be held responsible while the offer was being held open. Not a single word suggestive of release or forgiveness of sponsorship obligation for 7 of the remaining 22 programs, or, indeed, of any programs was mentioned on this or any other occasion, nor was there anything said at any time that ABC's offer was to have Kemper resume for "15" weeks only. The only discussion was as to whether Kemper would resume or go back on the program, which, of course, could only mean for the remaining unfulfilled period of the contract. There was no reason for ABC to give up the substantial sum represented by seven program sponsorships, well over $100,000, particularly since it had made the hiatus offer only after Kemper's counsel had suggested a friendly call from Mr. Hagerty, and even that offer involved a considerable loss to it.

Kemper has the burden of establishing its claim that there was a release or forgiveness of its obligation for seven weekly programs. Unless there is explicit language

showing such an understanding by the parties, it will not be implied from one ambiguous statement. A release of an obligation must be clearly and unequivocally expressed and understood as something being given up by an obligee. It simply does not make sense that, by a play upon words but without a direct word on the subject, ABC can be deemed to have agreed to give up outright its claim for 7 out of 22 programs in exchange for Kemper's mere promise to reconsider whether it would resume for 15 programs.

Actually, all during the hiatus period ABC's offer remained outstanding. On January 3, 1963 the Kemper board rejected ABC's offer. No agreement of any kind had been reached after the cancellation to change Kemper's obligations under its contract. The attempted accord never came into existence, even as an executory accord, since ABC's tender had not been accepted by Kemper (see *Petterson* v. *Pattberg*, 248 N. Y. 86, 88-89).

But, even if the board had accepted the offer, that would have been only an executory accord, defined as an agreement embodying a promise to accept at some future time a stipulated performance in satisfaction of a present claim or obligation and a corresponding promise to render such performance in satisfaction of such claim or obligation (General Obligations Law, §15-501, subd. 1, derived from Personal Property Law, §33-a, subd. 1). And, then, if Kemper had subsequently failed to perform the accord according to its terms, ABC would have had the choice of suing on the accord or the original obligation (General Obligations Law, §15-501, subd. 3, derived from Personal Property Law, §33-a, subd. 3).

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Kemper endeavors to build up on the flimsy foundation of these exploratory talks a theory of a subsequent agreement on November 30 superseding the original contract obligation. It is true that, where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement (*Blair & Co.* v. *Otto V.*, 5 A D 2d 276). But, if the intention of the parties, expressed by their conduct or words, is merely that the subsequent agreement provide for a future performance to be accepted as future satisfaction of an old obligation, such agreement is an executory accord, full performance of which alone extinguishes the old obligation. In the absence of a clear showing warranting a finding of superseder or substitution: "It is generally more reasonable to suppose that [a creditor] bound himself to surrender his old rights only when the new contract of accord was performed" (6 Williston, Contracts [Rev. ed.], §1847). In *Goldbard* v. *Empire State Mut. Ins. Co.* (5 A D 2d 230) the court held that there was nothing in the series of informal conversations to suggest the finality, deliberateness or occasional formalization associated with substituted agreements and the specific intention to discharge pre-existing obligations.

This review of the facts and the law makes clear ABC's right to sue on the basis of Kemper's November 14, 1962 cancellation, its damages being computable for the remaining contract period from November 14, 1962 to April 12, 1963. It merely withheld that suit until Kemper's board

refused its offer of an executory accord. The second partial defense, amended to be asserted as a complete defense, is accordingly dismissed on the merits.

The contract provided that Kemper pay a fixed sum for "program cost" and for "networking charge," which for the 22 Kemper play dates amounts to $119,350, plus "time charges" for station lineups, a classified rate for each station and a formula being set forth to compute the time charges to be paid to ABC by Kemper. The stations listed include five owned and operated by ABC itself and over 100 independent but affiliated stations. ABC had an affiliation agreement with these independent stations, which contained a formula for computing the amount of station compensation payment to be made by ABC when such station was in the lineup telecasting a sponsored ABC program. ABC retained the difference between the time charges paid by Kemper and the station compensation payments may by ABC. The total time charges which would have been payable by Kemper on the basis of the lineup clearing "Evening Report" on its 22 play dates amounted to $318,225.58.

Thus the total contract price for these 22 play dates, had Kemper complied with the contract, would have been $437,575.58. This figure is not substantially disputed.

"Evening Report" was a continuous program and ABC saved nothing in program costs or networking charges as the result of Kemper's cancellation of its participating sponsorship. ABC also had the right to sue for the total time charges provided for in Kemper's contract, even though it was required to pay a substantial portion thereof to the affiliated stations. Since Kemper's payment of these

total time charges was to be made to ABC in the first instance, it is not even necessary to invoke the authority of the provision in CPLR 1004, formerly section 210 of the Civil Practice Act, permitting a suit by or against a person "with whom or in whose name a contract has been made for the benefit of another" without joining the person for or against whose interest the action is brought.

However, when the court pointed out that Kemper would then be entitled to be credited with selloffs of any of Kemper's 22 play dates not only by ABC but also by the affiliated stations through local sales (immediately upon cancellation, on November 15, 1962, ABC had released for local sales by affiliated stations the "commercial positions formerly occupied by Kemper" subject to recapture only if ABC obtained network sponsorship for any such dates), ABC withdrew that portion of its claim represented by the station compensation payments which would have been payable to the affiliated stations had Kemper complied with the contract. ABC did not withdraw that part of its claim represented by the station compensation payable to its five owned and operated stations, properly crediting Kemper with local selloffs made by these five stations. Kemper's objection to the inclusion in this group of station WXYZ, Detroit, on the ground that it is a separate corporate entity, is misplaced. Not only is it actually a division of plaintiff distinguishable only in its corporate setup from the other four owned and operated stations, but ABC always had the right to include in its suit amounts represented by station compensation, provided only that it gave credit for local selloffs by such station.

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Kemper disputes ABC's computation of the amount of the affiliated station compensation payments being withdrawn and deducted by ABC from its claim. It should be noted that, in the interest of facilitating the trial, the court directed ABC to permit inspection of all relevant records for the purpose of verification of its accounting procedures and computations by Kemper's attorneys and accountants. ABC's computation of the affiliated station compensation payments to be deducted is $135,864.33, Kemper's $147,177.56. The court finds that Kemper's method of computation fails to take into account the approximate 20 hours of free time per month granted to ABC by the affiliation agreement. The computation has to be made as if Kemper had complied with the contract, not as if Kemper were subsequently adding to the payments actually made. The free time must be allocated in equal proportions among all the sponsored programs of the month to determine the portion of the monthly payment allocable to each program. Kemper's method would give it an advantage, even though it had broken the contract, merely because payment had already been made by all other sponsors who carried out their contracts. Deducting from the contract price of $437,575.58 the sum of $135,864.33, representing the withdrawn claim for the affiliated station compensation that would have been made for Kemper's 22 play dates, leaves a net contract price claim of $301,711.25.

However, ABC claims that there should be added the sum of $23,572.73, which is the amount of station compensation payments it contends it is obligated to pay, by reason of Kemper's cancellation, to the affiliated stations under a

28-day notice provision in the affiliation agreement. Strangely, enough, there is no provision referring to sponsorship cancellation as such, and the parties argue the applicability of two diverse provisions. ABC relies on a provision requiring that it give at least 28 days' advance notice of the "discontinuance of any scheduled series of network commercial programs," failing which it agrees to pay station compensation as if such series had continued for 28 days. Kemper claims the applicability here of a provision that ABC is not obligated to pay anything to an affiliate for the unsponsored portions of a program series agreed to be carried in its entirety by the station.

Although ABC maintains that it has been ABC's "policy" to pay affiliates under the 28-day notice provision where an affiliate requests such compensation for cancellation of a commercial sponsorship, it has not paid the only two affiliates who made such a request in this case. That provision by its terms is applicable only where a program series is discontinued. The reason for the provision apparently is that, without such advance notice, the affiliated stations would be involved in the problem and expense of hasty arrangements to provide a replacement program in addition to trying to get a sponsor. The provision does not apply where the series is continued by ABC despite the cancellation by one participating sponsor. The affiliates may then obtain compensation by means of local sales of the time made available by the cancellation without any program costs to themselves, as was here provided for by ABC's notification to the affiliates on November 15, 1962. If the 28-day provision were held to be applicable in this

situation, the affiliates would obtain station compensation from ABC as well as the proceeds of local sales for continuing ABC programs. The court holds that ABC is not obligated under this provision to its affiliates because of Kemper's cancellation, and that portion of the claim is not allowed.

The final step in the computation of damages is to determine the amount to be credited or deducted from the net contract price claim—i.e., whether it should be the proceeds realized by ABC in the actual selloffs of some of the 55 commercial minutes of Kemper's 22 cancelled play dates (as claimed by ABC) or the purportedly realizable value of all the 55 minutes (as claimed by Kemper). Kemper had 2½ minutes of commercial time per program.

The general rule of damages applicable to a breach of contract for the sale of goods is contract price less market value, the loss to a seller being the difference between the price he was to receive and the value of the goods, less any expense he saves. While the law imposes upon the party injured by a breach of contract the active duty of making reasonable exertions to render the injury as light as possible, the burden of proving that the damages sustained could have been prevented rests upon the party guilty of the breach (*Hamilton* v. *McPherson,* 28 N. Y. 72; *Losei Realty Corp.* v. *City of New York,* 254 N. Y. 41).

However, market value is not always the measure of recovery—as, for example, where there is no market for the type of goods involved, or where it is a contract for personal services, or where the subject matter of the contract is perishable. In such situations the damages are meas-

ured by the difference between contract price and cost of performance, on the principle that such sellers are entitled to the damages they have actually sustained by the breach of contract (5 Williston, Contracts [Rev. ed.], §1379).

Advertising contracts have been held to fall into the latter category, so that upon wrongful withdrawal by an advertiser the publisher is entitled to recover the contract price, reduced, as though the contract was one for services, by such amount as was or could have been obtained in the exercise of reasonable efforts to minimize damages by the use of that space for other advertisements (*Ware Bros. Co.* v. *Cortland Cart & Carriage Co.*, 192 N. Y. 439). A sponsorship contract is a purchase of the privilege of identification as sponsor of a broadcast program for the purpose of advertising its products (*Columbia Broadcasting System* v. *Amana Refrigeration*, 295 F 2d 375). Its essential characteristic is that it is a form of advertising, and damages for a breach thereof should be governed by the rule applicable to advertising contracts generally. Moreover, the subject matter—commercial minutes or time—is perishable, since, if not sold in time, it has vanished and is of no value to anyone. Furthermore, there has been no showing that there is a market or market value for commercial television minutes in the same sense as there is a market and market value for goods and commodities.

The rule, then, here applicable measures ABC's damages on the basis of reasonable efforts to sell off Kemper's available 55 minutes, reducing its net contract price claim by the proceeds realized from such sales as it could reasonably effect and not by the alleged market value of the entire

55 minutes. To keep the subject in perspective, it should be pointed out that the price in Kemper's contract dated August 15, 1962 amounted to about $7,500 net per commercial minute (after deducting 15% agency commission); that ABC's selloffs of 13½ of the 55 minutes were at an average net price of $4,080 per minute; and that Kemper's assumed market value, pursuant to a theory based on comparative audience ratings, is for the period here involved $5,100 net per minute, not far removed from ABC's selloffs.

The court determines that ABC made reasonable efforts, in light of the existent circumstances and consistent with its regular business practice, to sell off the available Kemper 55 minutes. On the day following the cancellation it notified all stations, including its five owned and operated stations, that they could proceed with local sales of such minutes, subject to ABC's obtaining full network sponsorship for any of these minutes; and, by withdrawing the portion of the claim allocable to the affiliated stations and giving credit for local sales effected by its five owned and operated stations, it has given Kemper the benefit of all local sales. Within a few days after the cancellation it notified its sales staff to sell these 55 minutes at an offering price of Kemper's $7,500 net per minute as a starting point for negotiations, which, could it have been realized, would have resulted in recoupment of Kemper's contract price.

The period from November to April is off-season for the procurement of television sponsorship. The major contracts are negotiated months before the Fall season, which commences about the latter part of September. In fact, ABC was unable to consummate any direct sales of

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Kemper minutes but only as parts of "package" contracts, in which a sponsor purchases for a lump sum minutes in several different programs and, on occasions, is given a certain number of minutes on a no-charge basis or as a "bonus." In these package sales ABC sold 6½ Kemper minutes at an average price per minute of $4,080; and 7 Kemper minutes at no charge, but these have likewise been credited to Kemper at the aforementioned average price of $4,080.

Consideration of the reasonableness of ABC's efforts and realizations in the selloffs of Kemper's cancelled 55 minutes, in light of the situation then prevailing, should include a comparative study of ABC's sales during this period of other available "Evening Report" minutes. Prior to and on November 14, 1962 there were available 97 unsold "Evening Report" minutes. These were also offered by ABC at a starting price for negotiations of $7,500 net per minute. By April 12, 1963, 33 had been sold, all in "package" sales at an average price of about $4,200 net per minute. The sales price was about the same as for Kemper minutes and the percentage of Kemper minutes sold is within the range of the percentage of non-Kemper minutes sold.

Kemper takes a strained view of ABC's selloff efforts. Its theory is that there is a precise mathematical relation between audience rating figures given by statistical services and value per minute applicable to all sponsored programs. It claims that the drop in audience rating of "Evening Report" since the negotiation of Kemper's contract brought the value of Kemper minutes down from $7,500 to $5,100

net per minute and contends, in effect, that ABC scared off possible purchasers by asking for $7,500 rather than $5,100. However, its argument loses sight of the practicalities of the situation—that ABC felt duty-bound to recover, if possible, the contract price; that ABC dealt with Kemper's minutes the same as it did with its other available "Evening Report" minutes; that the offering price was merely a starting price; that the actual sales prices realized on those "Evening Report" minutes which ABC succeeded in selling after negotiations were lower, though not by much, than Kemper's assumed value, proving that ABC did not turn down counteroffers because they were too low. The only reasonable conclusion is that there was no market as such at that time for sale of "Evening Report" minutes at higher prices. Certainly, ABC was interested in selling all the unsold "Evening Report" minutes, but the record establishes this could not be done in a manner consistent with its reasonable and regular business practice. ABC was not required, in the interest of minimizing Kemper's damages, to disrupt its business by selling Kemper minutes at such low prices as to assure a complete selloff. As it is, it went as far as it deemed advisable in selling at about the same price all it could of its "Evening Report" availabilities. Under the circumstances that price must be held to be a reasonable one; Kemper's own witnesses conceded that the effect of a large number of other availabilities would be to depress their stated value of $5,100 net per Kemper minute and that, in addition, a discount would normally be requested and granted if sold as part of a "package" sale.

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The selloffs by ABC, less the station compensation payments attributable thereto, and by its five owned and operated stations, realized $36,664.04. Thus, ABC's recoverable damages are in the sum of $265,047.21.

As to interest, CPLR 5001 (subd. [b]) provides that it "shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." It has been noted that the judgment entered on the first cause of action for the unpaid November 9, 1962 telecast included interest from that date, November 9, 1962. Here, in view of the so-called "hiatus" conversation on November 14, 1962, the earliest "ascertainable" date the cause of action existed with respect to the seven play dates in 1962 was January 4, 1963. Interest is accordingly awarded on the sum of $84,333.20 from January 4, 1963 and on the respective sums of $12,047.60 for each of the 15 weekly play dates in 1963 from those respective play dates.

APPENDIX C

Opinion of Cooper, District Judge, Dated August 14, 1963, Denying Motion to Dismiss Complaint in Federal Court (221 F. Supp. 848)

AMERICAN MFRS. MUT. INS. CO.

v.

AMERICAN BROADCASTING, ETC.

This is a motion by defendant pursuant to F.R.Civ.P. 12(b) (6) to dismiss the complaint for failure to state a claim upon which relief can be granted, or in the alternative that certain paragraphs of the complaint and certain sections of the prayer for relief be stricken pursuant to Rule 12(f).

As to Rule 12(b) (6): For purposes of such a motion, all the material allegations in the complaint are deemed true. Further, in determining the merits of the motion, it must be borne in mind that, "* * * a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" 2 Moore's Federal Practice, 2d Ed. (1962), p. 2245.

Appendix C

The underlying action is for damages and injunctive relief resulting from an alleged violation of Sec. 1 of the Sherman Act, 15 U.S.C.A. §1. Upon oral argument, plaintiffs, often referred to as the Kemper Insurance Companies (hereinafter Kemper) abandoned all reliance on violations of the Clayton Act, 15 U.S.C.A. §15, for purposes of this motion.

Plaintiffs contend that certain contracts entered into by defendant television network (hereinafter ABC) were tying agreements; that these agreements were a per se violation of the Sherman Act; and that Kemper sustained damages as a result.

Sec. 1 of the Sherman Act reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *."

The detailed complaint outlines the structure of the television industry insofar as it relates to the agreements made by ABC with its affiliated stations and potential sponsors. Kemper alleges that it approached ABC seeking sponsorship of an ABC news program called "Evening Report." The sponsorship sought by Kemper was for 95 affiliated stations of ABC. However, ABC essentially refused to allow such sponsorship unless Kemper agreed to sponsor "Evening Report" on an additional 35 stations.

Kemper's business purposes required only the 95 stations, and it further contends that the 35 additional stations were completely useless to it, for they were in an undesir-

able market area. For purposes of this motion, as stated above, these allegations are deemed admitted.

Kemper contends that the two separate tying agreements resulted in: (1) the tie-in of 35 undesired stations to 95 desired stations and (2) the tie-in of sponsorship on 35 undesired stations to the basic sponsorship of the unique program "Evening Report."

Defendant relies heavily on Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), to show that there is only one product involved here, namely, sponsorship of television programs, and thus there can be no tying agreement. This court cannot agree that there is only one product involved in the instant action.

Thirty-five undesirable stations are not the same as 95 desirable stations. Nor are 35 additional stations the same product as the sponsorship of a unique program. Furthermore, the Times-Picayune case has been limited to the exact set of facts before the court and readily distinguishable from the instant case. Cf. Northern Pacific R. Co. v. United States, 356 U. S. 1, 10, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

Indeed, the rationale of Times-Picayune (345 U. S. at p. 605, 73 S.Ct. at p. 878, 97 L.Ed. 1277), adopted in later cases, does not support defendant's contentions.

> "Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. * * * By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any in-

> trisic superiority of the 'tied' product would convince freely choosing buyers to select it over others, anyway."

This is precisely the situation Kemper maintains confronts it. Kemper was unable to exercise its best judgment as to the desirability of sponsoring "Evening Report" on an additional 35 stations, for by refusing, it could not sponsor the program initially. This, coupled with the economic leverage ABC was able to wield over its affiliated stations and the program, constituted, Kemper maintains, a per se violation of Sec. 1 of the Sherman Act.

Defendant again relies on Times-Picayune for the proposition that there must be a monopoly power or dominance over the tying product in order to constitute a per se violation. However correct this interpretation of Times-Picayune may be, its effect was vitiated in Northern Pacific where the Supreme Court said 356 U. S. at p. 11, 78 S.Ct. at p. 521, 2 L.Ed.2d 545:

> "While there is some language in the Times-Picayune opinion which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product."

This rationale was given added emphasis in United States v. Loew's Incorporated, 371 U. S. 38, at 45, 83 S.Ct.

97 at 102, 9 L.Ed.2d 11 (1962) where the court reaffirmed the position enunciated in Northern Pacific and immediately added:

> "Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

It is patent that the desirable program "Evening Report" is of a unique nature sufficient to give ABC a leverage to gain economic power over the tying product.

In addition, Kemper complains that by virtue of ABC's contracts with their affiliated stations, the affiliates are required to accept as sponsors for network programs those supplied by the network. This, too, contends Kemper, provides ABC with sufficient economic power to constitute a per se violation of the Sherman Act.

It cannot be said, therefore, that plaintiff is not entitled to any relief if the facts as alleged can be proved and demonstrated to a certainty.

Even if plaintiffs were not required to take the additional 35 stations, but would be forced, if they chose not to, to pay a disproportionately high rate for the 95 stations, this too would constitute a violation. See, United States v. Loew's Inc., supra, 371 U. S. 54, 83 S.Ct. 106-107, 9 L. Ed. 2d 11.

Defendant points to Productive Inventions Inc. v. Trico Products Corporation, 224 F. 2d 678 (2d Cir., 1955), cert.

denied 350 U. S. 936, 76 S.Ct. 301, 100 L.Ed. 818 (1956), and Conference of Studio Unions v. Loew's Inc., 193 F. 2d 51 (9th Cir., 1951), cert. denied 342 U. S. 919, 72 S. Ct. 342, 96 L. Ed. 687 (1952), in support of its contention that Kemper is not the proper party to bring this action. These cases are inapposite, for the plaintiffs in those cases were only indirectly harmed by the alleged restraints of trade.

It is true that the articles and reports quoted by plaintiffs in their memorandum are not determinative of the issue. However, their import is to manifest a directional change in the law which would seek to cover just such situations as the claims in the instant action. With the law in flux, this is all the more reason for denying a motion to dismiss for failure to state a claim upon which relief can be granted. Cf. Arfons v. E. I. Du Pont De Nemours & Company, 261 F. 2d 434 (2d Cir., 1954).

Accordingly, the motion to dismiss under Rule 12(b)(6) is denied.

Defendant moves, in the alternative, to strike certain of the paragraphs of the complaint and the prayer for relief. Some of these relate to the agreements between ABC and its affiliated stations; the others relate to a state court action instituted by ABC against Kemper and the requested injunction against this action.

Motions under Rule 12(f) are not favored. It is said in 2 Moore's Federal Practice, 2d Ed. (1962) at p. 2317:

> "Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied."

Even if the contracts between ABC and its affiliates do not constitute a tying agreement giving Kemper a cause of action, the allegations certainly have some bearing on the issues, even if only to demonstrate the economic power and leverage that ABC was able to exercise to control the tie-in.

The thrust of Rule 12(f), as discussed above, applies equally to the motion by ABC to strike those paragraphs relating to the state court action and the injunctive relief sought thereunder.

Defendant directs this court to Avon Publishing Co. v. American News Company, 143 F. Supp. 516 (S.D.N.Y. 1956), in addition to 28 U.S.C. §2283, as grounds for striking these matters. In Avon, an application for a preliminary injunction was denied, for there was no judgment of a federal court which required the protection afforded by the issuance of an injunction against a state court action. In the instant case, Kemper seeks an injunction only if and when the contract is found to be violative of the Sherman Act, and if such an injunction would be necessary to effectuate the judgment of this court. As the court in Avon said 143 F. Supp. at 519:

> "In the case at bar the contract, which is the subject of the action in the New York Supreme Court, has not been adjudicated as illegal under the Antitrust Acts and, therefore, there is no judgment in this Court which must be preserved by the issuance of an injunction."

The granting or denying of an injunction is properly within the ambit of the trial court upon a determination of

the issues in this case; the paragraphs relating to the state action and injunctive relief should not be stricken at this juncture.

Accordingly, defendant's motion is denied in its entirety.

This is to be considered an order; no settlement thereof is necessary.

So ordered.

APPENDIX D

Opinion of Mr. Justice Harlan Dated August 1, 1966, and Order Staying Judgment Pending Certiorari

SUPREME COURT OF THE UNITED STATES

No. ——. October Term, 1966.

American Manufacturers Mutual Insurance Co. *et al.*,

Petitioners,

v.

American Broadcasting-Paramount Theatres, Inc.

On Application for Stay Pending Certiorari.

[August 1, 1966.]

Memorandum of Mr. Justice Harlan.

This is an application for a stay, pending certiorari, of the enforcement of a New York Supreme Court money judgment awarded against petitioners in an action for breach of a radio broadcasting sponsorship contract. The questions sought to be brought to this Court for review all relate to the state court's disallowance of a defense predicated on the alleged illegality of this contract under federal antitrust laws. Having carefully considered the papers on both sides, and mindful that what is here involved is a state judgment and state cause of action, I conclude that

the requested stay should issue, conditioned, however, as hereafter indicated.

The claim that the contract in suit entailed a federally illegal "tying" arrangement cannot be regarded as lacking in substance in light of *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753, cert. denied, 382 U. S. 820, and does not appear to be precisely controlled by any decision of this Court. The posture of federal law relating to the availability of the asserted antitrust defense in this contract action is to say the least highly debatable. See *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227; *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 731; *Kelly* v. *Kosuga*, 358 U. S. 516. And the view of the state court that it could render judgment for the respondent without adjudicating the merits of petitioners' antitrust defense also presents a federal question which cannot be deemed devoid of substance. In these circumstances I am unable to say that the case bears no reasonable chance of review by this Court.

I have also deemed it incumbent upon me to consider two further questions, although they have been little if at all pressed in respondent's papers. The first is the failure of petitioners to show what ultimate damage they will suffer by reason of having to pay the judgment pending certiorari. The second is the ambiguity that exists as to whether petitioners sought a stay pending certiorari from the state courts before coming to me. I conclude that neither of these points prevents issuance of the requested stay.

With respect to a case arising in the federal system it seems to be accepted that a party taking an appeal from

the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with Fed. R. Civ. P. 62 (d) and 73 (d), see *In re Federal Facilities Realty Trust,* 227 F. 2d 651, 655; 7 Moore, Federal Practice ¶62.06 (2d ed. 1955); 3 Baron & Holtzoff, Federal Practice and Procedure §1374 (rules ed. 1958), and I perceive no substantial countervailing reason why at the certiorari stage this federal policy should not be applied to state cases presenting arguably substantial federal questions. As to the other question, I am disposed to accept Judge Van Voorhis' stay of judgment pending the making of this application as entailing sufficient compliance on the part of petitioners with this Court's Rule 27, and respondent does not argue to the contrary.

An order will issue staying enforcement of the New York judgment pending the timely filing of the petition for certiorari. Should such petition be so timely filed, this stay is to remain in effect pending the action of this Court on such petition. In the event the petition is denied, this stay shall terminate automatically. Should the petition for writ of certiorari be granted, this stay is to remain in effect pending the issuance of the mandate of this Court. This stay is conditioned upon the posting of a good and sufficient surety bond in the principal amount of the judgment and providing for costs, interest and damages for delay. Compare Supreme Court Rule 18. Such bond is to be posted with and approved by the Supreme Court of New York County, or a judge thereof, and when so posted and approved to be filed with the clerk of that court.

In reaching this decision I imply no view whatever upon any phase of the ultimate merits of the underlying controversy.

Appendix D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1966

AMERICAN MANUFACTURERS
MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

vs.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

UPON CONSIDERATION of the application of counsel for the petitioners and of the opposition of the respondent thereto,

IT IS ORDERED that the execution and enforcement of the judgment of the Supreme Court of New York County in the above-entitled case be, and the same is hereby, stayed pending the timely filing of a petition for writ of certiorari. Should such petition be so timely filed, the stay is to remain in effect pending action in this Court on such petition. In the event the petition is denied, the stay is to terminate automatically. Should the petition for writ of certiorari be granted, the stay is to remain in effect pending the issuance of the mandate of this Court.

Appendix D

The stay is conditioned upon the posting of a good and sufficient surety bond in the principal amount of the judgment and providing for costs, interest and damages for delay. Compare Supreme Court Rule 18. Such bond is to be posted with, and approved by, the Supreme Court of New York County, or a judge thereof and, when so posted and approved, to be filed with the Clerk of that Court.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States

Dated this 3rd
day of August, 1966.

A true copy JOHN F. DAVIS
Test:
Clerk of the Supreme Court
of the United States

By E. P. SULLIVAN
Chief Deputy

APPENDIX E

Orders and Judgments Below

Order Entered September 16, 1963, Dismissing Defense of Illegality Under the Sherman Act (Sixth Affirmative Defense)

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the New York County Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 12th day of September, 1963.

Present:

Hon. SAMUEL R. SILVERMAN, Justice

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff,

against

American Mfrs. Mutual Insurance Co.; American Motorists Insurance Co.; Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies," and Clinton E. Frank, Inc.,
Defendants.

The plaintiff having moved to strike out the affirmative defenses, dismiss the counterclaims, strike out certain por-

tions of the answer and for summary judgment pursuant to Rules 103, 109 and 113 of the former Rules of Civil Practice,

Now, on reading and filing the notice of motion dated May 31, 1963 and the affidavit of Donal L. Flynn, sworn to the 31st day of May, 1963, and Exhibits "A", "B", "C", "D", "E", "F" and "G" annexed thereto, and the affidavit of James C. Hagerty, sworn to the 28th day of May, 1963, with proof of due service thereof, in support of the motion, and the affidavit of John W. Castles III, sworn to the 20th day of June, 1963, and the affidavit of James S. Kemper, Sr., sworn to the 19th day of June, 1963, and the affidavit of James S. Kemper, Jr., sworn to the 19th day of June, 1963, and the affidavit of Buckingham W. Gunn, sworn to the 18th day of June, 1963, in opposition to the motion, and the affidavit of Donal L. Flynn, sworn to the 21st day of June, 1963, in reply, and the amended complaint and answer herein, and after hearing Clarence Fried, of counsel for Hawkins, Delafield & Wood, attorneys for the plaintiff, in support of the motion, and John W. Castles III, of counsel for Lord, Day & Lord, attorneys for the defendants, in opposition, and due deliberation having been had, and upon filing the opinion of the Court, it is on motion of Hawkins, Delafield & Wood, attorneys for the plaintiff,

ORDERED that the motion to strike the first, second, third, fourth, fifth and sixth defenses be and the same is hereby granted pursuant to the former Rules of Civil Practice 109, Subdivision 6, and the Civil Practice Law and Rules, Sec-

tion 3211(b), and the first, second, third, fourth, fifth and sixth defenses are hereby stricken from the answer as insufficient; and it is

FURTHER ORDERED that the motion to strike the first and second partial defenses be and the same is hereby denied; and it is

FURTHER ORDERED that the motion to dismiss the first and second counterclaims be and the same hereby is granted under the former Rules of Civil Practice 109, Subdivision 5, and under the Civil Practice Law and Rules, Section 3211(a), Subdivision 7, and the said first and second counterclaims of the answer be and the same are hereby dismissed; and it is

FURTHER ORDERED that the motion to strike portions of the answer under the former Rules of Civil Practice 103 be and the same is hereby granted only to the extent of striking Subparagraphs 8.(a) through 8.(f) and Paragraph 87. of the answer and otherwise said motion be and it is hereby denied; and it is

FURTHER ORDERED that summary judgment be and is hereby granted dismissing the complaint as to the defendant Clinton E. Frank, Inc.; and it is

FURTHER ORDERED that summary judgment be and is hereby denied as to the second cause of action; and it is

FURTHER ORDERED that summary judgment be and is hereby granted in favor of the plaintiff against all the

remaining defendants named in the complaint as to the first cause of action for the sum of $19,818.43, together with interest from November 9, 1962 and the costs and disbursements of said action to be taxed by the Clerk of this Court, and the Clerk of this Court is hereby directed to enter judgment in favor of the plaintiff and against the remaining defendants for said sum of $19,818.43, together with interest thereon from November 9, 1962 and the costs and disbursements of said action to be taxed as aforesaid, and that the action is severed accordingly.

Enter.

/s/ S. J. S.
J. S. C.

FILED
September 16, 1963
New York County Clerks Office.

Appendix E

Order of Affirmance Entered April 30, 1964, on First Appeal to New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of April, 1964.

Present—

Hon. Charles D. Breitel, Justice Presiding
" Francis L. Valente)
" James B. M. McNally,) Justices
" Harold A. Stevens,)
" Samuel W. Eager,)

7305

Order of Affirmance on Appeal from Order and Judgment

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff-Respondent,

vs.

American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies," and Clinton E. Frank Inc.,
Defendants-Appellants.

An appeal having been taken to this Court by the defendants-appellants from so much and such parts of an

order of the Supreme Court, New York County, entered on the 16th day of September, 1963, as is set forth in the Notice of Appeal herein, and from the judgment entered in the office of the Clerk of the County of New York on the 19th day of September, 1963, and said appeal having been argued by Mr. John W. Castles, 3d of counsel for the appellants, and by Mr. Clarence Fried of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is hereby unanimously ordered and adjudged that the judgment and order so far as appealed from be and and the same are hereby, in all things, affirmed on the opinion of Mr. Justice Silverman at Special Term; and that the respondent recover of the appellants the costs of this appeal.

Enter:

Vincent A. Massi,
Clerk.

Filed Apr 30, 1964

Appendix E

Judgment Entered March 18, 1965, After Trial on Issue of Damages in New York Supreme Court, New York County, Trial Term, Part X

[SAME TITLE]

This action having been regularly brought to trial on the 4th, 5th, 6th, 9th, 10th, 16th, 17th, 18th, 19th days of November, 1964 and 22nd day of January, 1965 at Special and Trial Term Part X of this Court held in and for the County of New York and after hearing the proofs and allegations of the parties and after hearing Hawkins, Delafield & Wood, Esqs., Clarence Fried, of counsel, attorneys for plaintiff, and Lord, Day & Lord, Esqs., John W. Castles 3d, of counsel, attorneys for defendants American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies", and Clinton E. Frank, Inc., and the Court having duly made and filed its decision in writing on the 12th day of March, 1965 and the complaint having been previously dismissed as against Clinton E. Frank, Inc. in the judgment entered September 19, 1963

Now, on motion of Clarence Fried, of counsel for the plaintiff, it is

ADJUDGED that the plaintiff have judgment against all the defendants (except Clinton E. Frank, Inc., the complaint having been dismissed as against said defendant

in the judgment entered September 19, 1963) in this action dismissing on the merits defendants' second partial defense (amended at the trial to be asserted as a complete defense) and that the plaintiff recover from the defendants, except Clinton E. Frank, Inc., the sum of $265,047.21 with interest on the sum of $84,333.20 from January 4, 1963 amounting to $11,160.10, on the sum of $12,047.60 from January 4, 1963 amounting to $1,594.30, on the sum of $12,047.60 from January 9, 1963 amounting to $1,584.26, on the sum of $12,047.60 from January 18, 1963 amounting to $1,566.19, on the sum of $12,047.60 from January 23, 1963 amounting to $1,556.15, on the sum of $12,047.60 from February 1, 1963 amounting to $1,540.09, on the sum of $12,047.60 from February 6, 1963 amounting to $1,530.05, on the sum of $12,047.60 from February 15, 1963 amounting to $1,511.97, on the sum of $12,047.60 from February 20, 1963 amounting to $1,501.93, on the sum of $12,047.60 from March 1, 1963 amounting to $1,479.85, on the sum of $12,047.60 from March 6, 1963 amounting to $1,469.81, on the sum of $12,047.60 from March 15, 1963 amounting to $1,451.74, on the sum of $12,047.60 from March 20, 1963 amounting to $1,441.69, on the sum of $12,047.60 from March 29, 1963 amounting to $1,423.63, on the sum of $12,047.60 from April 3, 1963 amounting to $1,415.59, and on the sum of $12,047.60 from April 12, 1963 amounting to $1,397.52, all interest aggregating the sum of $33,624.87, making a total of $298,672.08, together with the costs and disbursements in the sum of $192.95 as taxed, making in all the sum of $298,865.03.

Appendix E

Judgment signed this 18th day of March, 1965.

Dated: New York, New York
March 18, 1965

/s/ JAMES McGURRIN
Clerk

Filed
Mar 18 1965
New York
County Clerk's Office

PLAINTIFF'S ADDRESS:

American Broadcasting-Paramount Theatres, Inc.
7 West 66th Street
New York 23, New York

DEFENDANTS' ADDRESSES:

The Kemper Insurance Companies
4750 Sheridan Road
Chicago 40, Illinois

American Mfrs. Mutual Insurance Co.
American Motorists Insurance Co.
Federal Mutual Insurance Co.
Lumbermen's Mutual Casualty Co.
342 Madison Avenue
New York, New York

Appendix E

Order of Affirmance Entered November 23, 1965, on Second Appeal to New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of November, 1965.

Present—

Hon.	Charles D. Breitel,	Justice Presiding
"	Benjamin J. Rabin,	)
"	Francis L. Valente,	) Justices
"	Samuel W. Eager,	)
"	Aron Steuer,	)

9489

Order of Affirmance on Appeal from Judgment

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff-Respondent,

vs.

American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies,"
Defendants-Appellants.

An appeal having been taken to this Court by the defendants-appellants from the judgment of the Supreme

Appendix E

Court, New York County, entered on the 18th day of March, 1965, in favor of plaintiff and against defendants in the sum of $298,865.03, and said appeal having been argued by Mr. John W. Castles, 3d of counsel for the appellants, and by Mr. Clarence Fried of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondent recover of the appellants $50 costs of this appeal, on the opinion of Mr. Justice Geller at Special and Trial Term.

Enter:

Hyman W. Gamso
Clerk.

Filed Nov 23 1965

Appendix E

Order of Appellate Division Entered February 3, 1966, Granting Leave to Appeal to New York Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of February, 1966.

Present—

Hon.	Charles D. Breitel,	Justice Presiding
"	Benjamin J. Rabin,	)
"	Francis L. Valente,	) Justices
"	Samuel W. Eager,	)
"	Aron Steuer,	)

9489

Order Granting Leave to Appeal to Court of Appeals from Final Judgment

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff-Respondent,

vs.

American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies,"

Defendants-Appellants.

The above-named defendants having moved this Court for leave to appeal to the Court of Appeals from the order of this Court entered in the office of the Clerk of this Court

on November 23, 1965, affirming the judgment of the Supreme Court, New York County, entered in the Office of the Clerk of the County of New York on March 18, 1965 and from said judgment, in order to review the aforesaid order, judgment, and the order of this Court entered on April 30, 1964 affecting said order and judgment,

Now, upon reading and filing the notice of motion dated December 23, 1965, with proof of service thereof, the affidavit of John W. Castles 3d sworn to on December 23, 1965, in support of the motion, the affidavit of Clarence Fried sworn to on December 30, 1965, in opposition thereto, and the reply affidavit of John W. Castles 3d sworn to on January 3, 1966, in support of the motion, and upon the aforesaid orders of this Court entered on April 30, 1964 and November 23, 1965, the records on appeal, and upon all of the proceedings heretofore had herein, and the said motion having been submitted by Lord, Day & Lord, the attorneys for defendants-appellants, in support of said motion, and by Hawkins, Delafield & Wood, the attorneys for the plaintiff-respondent in opposition thereto, and this Court having filed its decision in writing granting said motion, it is hereby:

ORDERED that the motion for leave to appeal be, and it hereby is, granted, and this Court hereby states that questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals.

Enter:

Samuel W. Eager

Filed Feb. 3—1966

Appendix E

Order of Affirmance of New York Court of Appeals
Dated June 2, 1966

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk*

---

1. No. 91. 66

American Broacasting-Paramount Theatres, Inc.,
Respondent,

vs.

American Mfrs. Mutual Insurance Co., & ors., &c.,
Appellants,

and

Clinton E. Frank, Inc.,
Defendant.

Appendix E

BE IT REMEMBERED, that on the 26th day of February in the year of our Lord one thousand nine hundred and sixty-six, American Mfrs. Mutual Insurance Co., & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Lord, Day & Lord, their attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And American Broadcasting-Paramount Theatres, Inc., the respondent—in said cause, afterwards appeared in said Court of Appeals by Hawkins, Delafield & Wood, its attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John W. Castles, III, of counsel for the appellants, and by Mr. Clarence Fried, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it

given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 2, 1966

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon
Clerk.

SEAL

APPENDIX F

Amended Complaint

[Same Title]

Plaintiff, by its attorneys, Hawkins, Delafield & Wood, complaining of the defendants, respectfully alleges:

As and for a First Cause of Action

First: Plaintiff is a domestic corporation.

Second: Upon information and belief, the defendant American Mfrs. Mutual Insurance Co. is a domestic corporation.

Third: Upon information and belief, the defendant American Motorists Insurance Co. is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

Fourth: Upon information and belief, the defendant Federal Mutual Insurance Co. is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

Fifth: Upon information and belief, the defendant Lumbermen's Mutual Casualty Co. is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

Sixth: Upon information and belief, the defendants American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., together with the Fidelity

Life Association, an Illinois corporation, are collectively known as and are conducting business under the trade name and style of "The Kemper Insurance Companies."

SEVENTH: Upon information and belief, the defendant Clinton E. Frank, Inc. is a foreign corporation organized under the laws of the State of Delaware with its office and principal place of business in the City of Chicago, State of Illinois and has an office and does transact business at 527 Madison Avenue in the City, County and State of New York.

EIGHTH: On or about August 15, 1962 plaintiff and defendants entered into a television network contract whereby defendants agreed to sponsor one broadcast of plaintiff's television program "Evening Report" per week for a period of 26 weeks commencing on October 17, 1962, said program to be broadcast over plaintiff's ABC-TV Network. A copy of said contract is annexed hereto and made a part hereof, marked Exhibit A.

NINTH: Pursuant to said contract, plaintiff broadcast the program "Evening Report" over its television network under defendant's sponsorship on November 9, 1962.

TENTH: Under the terms of said contract, defendants were required to pay to plaintiff the sum of $19,818.43 for said broadcast of November 9, 1962.

ELEVENTH: Defendants have failed and refused to pay the aforesaid sum to plaintiff, although payment has been duly demanded.

TWELFTH: Plaintiff has duly performed all the terms and conditions of the aforesaid agreement on its part to be performed.

Appendix F

AS AND FOR A SECOND CAUSE OF ACTION

THIRTEENTH: Plaintiff repeats and realleges the allegations contained in paragraphs "FIRST" through "EIGHTH" and paragraph "TWELFTH" of this amended complaint with the same force and effect as though fully set forth in this paragraph.

FOURTEENTH: On or about November 14, 1962 defendants breached the aforesaid television network contract by refusing to permit plaintiff to continue to broadcast said program under defendants' sponsorship and by cancelling said sponsorship, and by instructing plaintiff to return all of defendants' schedules, film commercials and scripts.

FIFTEENTH: Plaintiff at all times has been ready and willing to make full performance of the said agreement and would have done so except for the acts of defendants as herein alleged.

SIXTEENTH: By reason of the foregoing, there is now due by defendants to plaintiff the sum of $432,693.22.

WHEREFORE, plaintiff demands judgment against defendants in the sum of $19,818.43 under the first cause of action and judgment in the sum of $432,693.22 under the second cause of action, together with interest thereon as provided by law and the costs and disbursements of this action.

HAWKINS, DELAFIELD & WOOD
Attorneys for Plaintiff
Office and P. O. Address
67 Wall Street
New York 5, New York

(Verified May 2, 1963.)

Appendix F

"Exhibit A" Appended to Amended Complaint

AMERICAN BROADCASTING COMPANY
7 West 66th Street - New York 23, N. Y.
Susquehanna 7-5000

August 15, 1962

Clinton E. Frank, Inc.
Merchandise Mart
Chicago 54, Illinois

Attention: Mr. A. S. Trude, Jr.
Vice President & Director of Media

Gentlemen:

This will acknowledge with thanks receipt of your letter dated June 5, 1962. The following shall set forth the agreement between you and us for sponsorship by your client, The Kemper Insurance Companies, of the ABC Evening Report to be telecast during the 1962-1963 season over the ABC-TV Network on the following terms and conditions:

1. The firm order is for one program per week over a twenty-six week period beginning October 17, 1962. This program is scheduled in the evening hours (Monday thru Friday) at the following times in the following time zones:

Eastern	6:00-7:30 PM
Central	5:30-6:30 PM
Mountain	5:30-6:30 PM
Pacific	6:00-7:30 PM

In the event a specific station is scheduled (or rescheduled) outside of the time pattern for a particular time zone as set forth above, your client shall have the right to cancel

its sponsorship of such station on four weeks prior notice. Commencing with the telecast scheduled for October 17, 1962, WBKB, ABC-TV's Chicago affiliate, shall telecast the program between 5:45-6:00 PM. Any station's failure to clear shall not constitute a breach of contract. ABC has the right to schedule station breaks in accordance with its then current policy.

2. The day of the week is to be Wednesday alternating weekly with Friday over the twenty-six week period. Week 1, Wednesday sponsorship; Week 2, Friday sponsorship; Week 3, Wednesday sponsorship; Week 4, Friday sponsorship; and so on throughout the twenty-six week period. THE KEMPER INSURANCE COMPANIES shall have sole sponsorship of the EVENING REPORT program on the days of their sponsorship.

3. The time charges for the stations indicated as Group I & III on the ordered station lineup attached are based on the rates in effect as of June 5, 1962 (which rates are subject to change on six months prior notice), and are based upon 40% of the applicable gross hourly rate, less a special 42.5% discount in lieu of all other discounts. These rates are subject to agency commission.

4. The time charges for the stations indicated as Group II on the ordered station lineup attached are based on the rates in effect as of June 5, 1962 (which rates are subject to change on six months prior notice), and are based upon 40% of the applicable gross hourly rate, less a special 50% discount in lieu of all other discounts. These rates are subject to agency commission.

Appendix F

5. THE KEMPER INSURANCE COMPANIES have the right to accept or reject any additional stations to the lineup shown on the attached ordered station lineup.

6. The program cost is $5,000. net per one-quarter hour delivered. The networking charge is $500. gross per one-quarter hour delivered.

7. The telecast schedule is subject to force majeure omissions, preemptions and delays for the purpose of broadcasting programs reasonably deemed by ABC to be of major public importance and the telecast schedule is also subject to withholdings in accordance with ABC's established practice applicable to such situations. In the event of such total omissions, preemptions, delays or withholdings, ABC shall attempt to arrange a mutually acceptable make good in the ABC EVENING REPORT program. Failing such mutually agreeable make good, KEMPER INSURANCE shall be entitled to a pro rata credit. In the event of such omissions, preemptions, delays or withholdings, subject to exigency, an announcement of KEMPER INSURANCE COMPANIES' sponsorship of such omitted, preempted, delayed or withheld program will be made. ABC shall make every reasonable effort to keep local preemptions at a minimum. *DLF* *AST*

The complete cancellation caused by voluntary preemption or by transmission failure yields full airtime credit to a sponsor so affected.

8. A time charge credit issued for a partial impairment of program airtime would be based upon an exact proration of time lost with respect to time scheduled. Because pro-

gram airtime loss could conceivably occur anywhere within a show, and because program formats differ widely, no standard credit processing system would ever attempt to distinguish between the relative importance of any one program portion with respect to any other. Therefore a loss of any portion of any show is given the same regard. That is, a partial program airtime loss from the top of a show, whether due to a local transmitter failure, AT&T line failure or run-over of the preceding program, would be treated in the same manner as a partial loss of any other point within the show. One minute of program airtime must be lost before time charge credit will be issued. As a matter of policy, all initial credits are calculated on the program airtime loss.

A. The American Broadcasting Company, consistent with the industry-wide procedure of allowing a percentage of the interruption if only one signal (video or audio) is impaired, reduces a time charge credit by 25% for video loss or 50% for audio loss of program time.

9. If the commercial message is interrupted, the time charge credit is based on the proration that the amount of commercial time interrupted bears to the total commercial time in the program. ABC's usual method for determining the value of commercial damage is based upon the fact that a maximum of 200 seconds of commercial time is allowed a sponsor for one-half hour of class A time; i.e., 180 seconds devoted to actual commercials and twenty seconds allotted to billboards. In cases where this amount is exceeded, then such average is deducted from the length of

commercial time and the resulting figure then prorated over the 200 second base. When no average occurs, i.e., when the total commercial minute is equal to or under the allotted *DLF*
amount, then an exact proration of time lost over time *AST*
scheduled is made. A minimum amount of seven seconds *DLF*
of commercial time must be lost before a time charge credit *AST*
can be issued.

10. THE KEMPER INSURANCE COMPANIES shall have two and one-half minutes of commercial time plus a ten second opening and a ten second closing billboard per one-quarter hour. There shall be three commercial positions within each program.

11. ABC will endeavor to provide on a network basis a separation of fifteen minutes between KEMPER INSURANCE commercials and billboards and any commercials or billboards in adjacent programs which are competitive to KEMPER INSURANCE COMPANIES' authorized products. Product protection may be reduced by several minutes from time to time due to format exigencies but in no event less than ten minutes. Furthermore, ABC during any week of which *DLF*
KEMPER INSURANCE is a sponsor of the ABC EVENING RE- *AST*
PORT program, will not authorize for advertising on a net- *DLF*
work basis on the ABC EVENING REPORT program products *AST*
or services competitive to the products and services authorized to be advertised on the program by THE KEMPER INSURANCE COMPANIES. It is understood that ABC will not accept any other product categories or commercials which are not in good taste as determined by the ABC Continuity Department.

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12. ~~In lieu of this paragraph, please substitute the following:~~ ABC agrees to indemnify, defend and hold harmless THE KEMPER INSURANCE COMPANIES, Clinton E. Frank, Inc., and their respective directors, officers, agents, and employees from and against any and all suits, claims, liabilities, infringements, loss, damages, costs, expenses reasonable attorneys' fees, including reasonable attorneys' fees, costs and expenses in enforcing this covenant, which may arise in whole or in part out of the preparation or telecasting of ABC material described hereunder and to defend at ABC's own expense any litigation instituted by others against any of them resulting therefrom and KEMPER INSURANCE COMPANIES shall similarly indemnify, defend, and hold harmless ABC, and its directors, officers, agents, employees and stations telecasting the program with respect to any material furnished for telecasting by THE KEMPER INSURANCE COMPANIES, provided that ABC is not negligent in the handling of such material.

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13. ABC authorizes THE KEMPER INSURANCE COMPANIES to use and license others to use during the term hereof the title of the program, and the name, sobriquet, biography and likeness of regular featured personalities in the program for informative purposes and to advertise and publicize the network and the program, in whole and in part, either alone or in conjunction with the advertising of the protected products of KEMPER as designated hereunder. Any such use of advertising or publicity by KEMPER INSURANCE pursuant to this paragraph shall not constitute a direct or implied endorsement. All such publicity material and advertising material shall be subject to the prior approval

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of the ABC Advertising and Promotion Department in New York. ABC shall not unreasonably withhold its approval and such approval shall be obtained through ABC-Chicago, after it has been transmitted from ABC-New York.

14. ABC will furnish for each program all elements for the program presentation including, without limitation, network facilities, the principal and/or featured personalities, other cast, rights, script, direction, music and production facilities and services therefore, including scenery, props, costumes, studio and technical facilities and personnel necessary to the appropriate television presentation of the program. Each ABC supplied program will conform to ABC's programming and operating policies and technical standards. Program content, format and quality shall continue on the high standards of current ABC EVENING REPORT programs.

15. ABC shall announce at the end of each KEMPER INSURANCE sponsored ABC EVENING REPORT program that "ABC's News Department is solely responsible for this telecast", or words to similar effect.

16. If any performer regularly employed in connection with the ABC EVENING REPORT program commits or has at any time committed any act, knowledge of which is made public during the term of this agreement (May 4, 1962 to the end of the contract period), or does anything which shall be an offense involving moral turpitude or which brings Clinton E. Frank, Inc., or THE KEMPER INSURANCE COMPANIES into public disrepute, contempt, scandal or rid-

icule, or which might insult or offend the community or any substantial group thereof, THE KEMPER INSURANCE COMPANIES have the right within fifteen (15) days after such act or thing becomes generally known to require ABC to terminate as soon as possible the services of such person and furnish a substitute of comparable stature or if the same becomes generally known before May 4, 1962 THE KEMPER INSURANCE COMPANIES shall have the right to request similar termination and/or substitutions within fifteen (15) days from the time KEMPER is informed by ABC, or KEMPER INSURANCE learns that such person will appear on the program. This right may only be exercised providing ABC and KEMPER INSURANCE concur. ABC shall not unreasonably withhold its concurrence.

17. ABC agrees that all costs reflected within this order represent the full charges to THE KEMPER INSURANCE COMPANIES for the programs ordered herein and include cable, line and network, program and time charges.

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Commercial treatment charges will be additional and ABC will be reimbursed by KEMPER INSURANCE for their proportionate share of any sales and/or use tax charges which ABC pays in connection with the programs sponsored by KEMPER INSURANCE.

18. THE KEMPER INSURANCE COMPANIES shall furnish to ABC all commercial material and billboards at their expense and in accordance with ABC's delivery and acceptability policies. KEMPER INSURANCE shall pay for insertion, integration and any other services or facilities which ABC

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and/or supplier furnishes in connection with commercials or billboards at the applicable ABC and/or supplier rates.

Please confirm that the foregoing constitutes the understanding and agreement between you and us and shall remain so until superseded or amended by some other written document or documents signed by both of us.

Very truly yours,

AMERICAN BROADCASTING COMPANY
A Division of American Broadcasting-Paramount Theatres, Inc.

By DONAL L. FLYNN
Assistant General Sales Attorney

Accepted and Agreed to:

CLINTON E. FRANK, INC.

By ALFRED S. TRUDE, JR.
8/20/62

Appendix F

Group I **August 15, 1962**

ATTACHMENT A

To ABC's Acknowledgment of
Kemper Insurance Company's Order for sponsorship

of

ABC EVENING REPORT

Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*	
WAKR-TV	Akron	6:45	$ 150		
WFBG-TV	Altoona	Pending	1,000		
WAST	Albany, N. Y.	6:30	900		
WAIN-TV	Anderson	6:45	150		
WLOS-TV	Asheville	6:45	750		
WIW-A	Atlanta	7:15	1,100		
WROW	Augusta, Ga.	6:00	375		
WJZ-TV	Baltimore	6:15	1,650		
New	Binghampton	Pending	Rate to be Determined		
WNAC-TV	Boston	6:00	2,800		
WUSN-TV	Charleston, S. C.	6:15	500		
WHTN	Huntington, W. Va.	6:45	850		
WTVC	Chatanooga	6:00	450	500	1/1/63
WKRC-TV	Cincinnati	6:00	1,750		
WCCA-TV	Columbia, S. C.	6:45	200		
WXYZ-TV	Detroit	6:30	3,000		
WICU-TV	Erie	6:45	725		
WJPB	Fairmont	6:15	225		
WPTA	Fort Wayne	7:15	525		
New	Greenville, Wash.	Pending	Rate to be Determined		
WTPA	Harrisburg, Pa.	6:15	425		
WHYN-TV	Holyoke	7:15	450		
WLW-1	Indianapolis	6:15	1,400		
WTVK	Knoxville	6:00	300		
WLYH-TV	Lebanon	7:15	300		
WLVA-TV	Lynchburg	6:30	350		
WKYT	Lexington	6:00	165	200	12/1/62

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Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*
WNUR-TV	Manchester	6:45	600	
WMTW-TV	Mt. Washington	7:00	700	
WNHC-TV	New Haven	7:00	1,750	
WABC-TV	New York	6:00	6,750	
WVEC-TV	Norfolk	6:15	850	
WLOF-TV	Orlando	6:00	525	
WFIL-TV	Philadelphia	7:15	4,000	
WTAE	Pittsburgh	6:15	2,500	
WRVA	Richmond	7:15	700	
WSUN-TV	St. Petersburg	6:00	475	
WNEP-TV	Scranton	6:45	650	
WSPD-TV	Toledo	7:00	1,000	
WATR-TV	Waterbury	6:00	200	
WMAL-TV	Washington, D. C.	6:00	1,650	
WEAT-TV	West Palm Beach	6:30	225	
WSBA-TV	York	6:45	250	
WKST-TV	Youngstown	6:45	450	
KTEN-TV	Ada	5:45	225	
KTET-TV	Austin, Minn.	6:15	300	
KBMT-TV	Beaumont	5:30	350	
WBRC-TV	Birmingham	5:45	1,450	
KORG-TV	Cedar Rapids	5:30	625	
WBKB-TV	Chicago	5:45	4,200	
WFAA-TV	Dallas	5:45	1,500	
WTVP	Decatur, Ill.	6:00	400	
WOI-TV	Des Moines	5:30	700	750 eff. 1/1/63
WTVW	Evansville	5:30	700	
KXGO-TV	Fargo	5:15	300	
KNOX-TV	Grand Forks	5:15	100	
WLUK-TV	Green Bay	5:30	600	
WSIL-TV	Harrisburg, Ill.	5:45	350	
KAYS-TV	Hays, Kan.	5:30	Cancelled eff. 9/1/62 as Prime Affil.	
KHPL-TV	Hays Center, Neb.	6:00	Bonus	
KTRK-TV	Houston	6:15	1,350	1,450 eff. 1/1/63
KMBC-TV	Kansas City	5:45	1,500	

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Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*
KHOL-TV	Kearney	6:15	400	
KATV	Little Rock	Pending	500	
New	Lake Charles, La.	Pending	Rate to be Determined	
WLKY-TV	Louisville	6:00	100	150 eff. 1/1/63
WKOW-TV	Madison	6:00	325	
WHBQ-TV	Memphis	Pending	1,100	
KNSP-TV	Minneapolis	6:00	1,250	
WEAR-TV	Mobile	5:30	500	
WSIX-TV	Nashville	5:45	950	
WVUE	New Orleans	6:15	800	
KOCO-TV	Oklahoma City	5:30	700	
KETV	Omaha	5:30	950	
KCND-TV	Pembina	4:45	Bonus	
WTVH-TV	Peoria	5:45	525	550 eff. 1/1/63
WREX-TV	Rockford	5:30	600	
KTVI	St. Louis	5:45	1,650	
KONO-TV	San Antonio	5:45	875	
KTBS-TV	Shreveport	6:15	600	
WSJV-TV	South Bend	5:45	450	
KTUL-TV	Tulsa	5:45	775	800 eff. 1/1/63
KAKE-TV	Wichita	5:30	900	
KSWO-TV	Wichita Falls	6:15	300	
KVKM-TV	Monahans	6:45	Bonus	
KOAT-TV	Albuquerque	5:45	350	
KRDO-TV	Colo. Springs	Pending	300	
KBTV	Denver	5:30	900	950 eff. 1/1/63
KTVK	Phoenix	5:45	550	
KCPX	Salt Lake City	6:15	800	
KEZI-TV	Eugene	6:00	200	225 eff. 1/1/63
KLYD-TV	Bakersfield	6:45	250	
KOTI-TV	Klamath Falls	5:00	150	
KABC-TV	Los Angeles	6:15	4,000	
KPTV	Portland	6:45	1,050	
KGO-TV	San Francisco	7:15	2,400	
KNTV	San Jose	6:15	300	

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Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*
KOMO-TV	Seattle	6:15	1,500	
KREM-TV	Spokane	6:15	550	
KNDO-TV	Yakima	6:30	325	350 eff. 11/1/62
KNDU-TV	Richland	6:30	Bonus	
KSIN-TV	Salina	5:45	Bonus	
Group II				
WKBW-TV	Buffalo	7:15	1,500	2,000 eff. 1/1/63
WEWS	Cleveland	Pending	2,600	
WTVN-TV	Columbus, Ohio	Pending	1,250	
WLBW	Miami	6:00	1,000	
WRAL	Raleigh	Pending	1,150	
WNYS	Syracuse	TBA	850	
WOOD-TV	Grand Rapids	Pending	1,300	
KOVR	Sacramento	Pending	800	850 eff. 1/1/63
KVII-TV	Amarillo	Pending	325	
WAFB/WBRZ	Baton Rouge, La.	Pending	450/625	
WPTZ	Plattsburg, N. Y.	Pending	400	
WOC	Davenport	Pending	1,100	
KJEO	Fresno	Pending	575	
WFMY-TV	Greensboro	Pending	900	
WJRT	Flint	Pending	1,000	
Group III				
WBTV/WSOC	Charlotte, N. C.	Pending	1,450/1,350	
WJTV/WLBT	Jackson, Miss.	Pending	600/550	
WITI-TV	Milwaukee	Pending	1,500	
WJAR/WPRO	Providence	Pending	1,550/1,400	
WOKR-TV	Rochester	TBA	800	
XETV	San Diego	Pending	800	
WKTV	Utica	Pending	550	
KALB-TV	Alexandria, La.	Pending	275	
WABI/WLBZ	Bangor, Me.	Pending	400/375	
KRIS/KZTV	Corpus Christi	Pending	350/375	
WDAM-TV	Hattiesburg	Pending	200	
WJXT/WFGA	Jacksonville, Fla.	Pending	850/875	
WSAV/WTOC	Savannah	Pending	350/325	

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APPENDIX G

Answer

[SAME TITLE]

Defendants by their attorneys, Lord, Day & Lord, answering the amended complaint herein, on information and belief:

1. Admit that defendant, American Manufacturers Mutual Insurance Company sued herein as "American Mfrs. Mutual Insurance Co.," is a domestic corporation.

2. Admit that the defendant, American Motorists Insurance Company sued herein as "American Motorists Insurance Co.," is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

3. Admit that the defendant, Federal Mutual Insurance Company sued herein as "Federal Mutual Insurance Co.," is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

4. Admit that the defendant, Lumbermens Mutual Casualty Company sued herein as "Lumbermen's Mutual Casualty Co.," is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

5. Admit that the defendants, American Manufacturers Mutual Insurance Company, American Motorists Insurance

Company, Federal Mutual Insurance Company and Lumbermens Mutual Casualty Company, are sometimes referred to as "The Kemper Insurance Companies," and except as so expressly admitted deny each and every allegation of Paragraph SIXTH of the amended complaint.

6. Deny each and every allegation contained in Paragraphs EIGHTH, NINTH, TENTH, FOURTEENTH, FIFTEENTH and SIXTEENTH of the amended complaint.

7. Admit that no part of the sum of $19,818.43 has been paid to the plaintiff, and except as so expressly admitted deny each and every allegation contained in Paragraph ELEVENTH of the amended complaint.

8. Deny each and every allegation in Paragraph TWELFTH of the amended complaint and specifically deny plaintiff's allegation of due performance with respect to:

(a) plaintiff's duty not to promote programs sponsored by competitors of the insurance company defendants (hereinafter "Kemper Companies" or "Kemper") during the "ABC Evening Report" programs delivered by ABC for Kemper or within 10 minutes thereof;

(b) plaintiff's duty to utilize broadcast time sold and delivered to Kemper exclusively for Kemper's purposes;

(c) plaintiff's duty not to damage Kemper's good will;

(d) plaintiff's duty not to do anything which would or might divert the Kemper audience from Kemper or its products;

(e) plaintiff's duty not to do anything during the "ABC Evening Report" programs sponsored by Kemper which would or might result in promoting the products or standing of a competitor of Kemper's;

(f) plaintiff's duty not to do anything during the "ABC Evening Report" programs sponsored by Kemper that would or might damage Kemper's good will and standing with the public; and

(g) plaintiff's duty not to do anything during the "ABC Evening Report" programs sponsored by Kemper which would or might be inconsistent with or contrary to the objective of increasing sales of Kemper's products and of promoting Kemper's good will and standing with the public, all as more fully alleged in the Fourth and Fifth affirmative defenses which are incorporated herein.

9. In answer to Paragraph THIRTEENTH of the amended complaint defendants repeat each and every denial and allegation hereinabove set forth in answer to Paragraph EIGHTH and Paragraph TWELFTH of the amended complaint with the same force and effect as if fully set forth in this paragraph.

AS AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, TO THE SECOND CAUSE OF ACTION, DEFENDANTS ALLEGE ON INFORMATION AND BELIEF:

10. The Kemper Companies are and have been engaged in the insurance business for many years in many areas throughout the United States. Success of Kemper's insurance business throughout the United States depends on

maintaining the good will of its customers and potential customers, and on the public's wareness of the Kemper Companies, their insurance policies, and their services. In order to maintain and increase this good will and public awareness Kemper has found it necessary and desirable to advertise its names, policies, and services throughout the United States by various advertising media, including television.

11. Through its division, The American Broadcasting Company (hereinafter "ABC") plaintiff operates a major television network. It owns several television stations and has affiliation contracts with many other television stations. ABC produces programs for broadcast over its television network.

12. On or about May 4, 1962 Kemper, by its agent Clinton E. Frank, Inc. (hereinafter "Frank"), sent by letter to ABC an order for sponsorship of the program "ABC Evening Report" (hereinafter "Evening Report") by Kemper. ABC did not accept the terms of this order.

13. On or about August 15, 1962, ABC wrote a letter to Frank and in said letter acknowledged receipt of and acknowledged the terms of Kemper's order, as modified on ABC's insistence, for sponsorship of "Evening Report." On August 20, 1962 Kemper agreed that said letter of acknowledgment of ABC correctly embodied the terms of Kemper's order as modified on ABC's insistence. Said letter dated August 15, 1962 is hereafter referred to as the

"ABC acknowledgment of order," a copy of which is annexed to the amended complaint as Exhibit A.

[Remainder of First Defense and Second Through Fifth Defenses Omitted]

* * *

AS AND FOR A SIXTH, SEPARATE AND COMPLETE DEFENSE, TO THE FIRST AND SECOND CAUSES OF ACTION, DEFENDANTS ALLEGE ON INFORMATION AND BELIEF:

51. Defendants repeat and reallege each and every allegation contained in paragraphs 10 through 13 of this answer as though the same were herein fully set forth.

52. The plaintiff conducts business in the several states of the United States, including the State of New York. The plaintiff entered into the contracts and combinations hereinafter described within the said state, and many of the acts pursuant thereto were committed within the state. The plaintiff transacts business within the state in interstate trade and commerce, hereinafter described, and has been conducting and is now conducting such business in part within the said state.

53. Kemper's customers in the insurance business are individuals who are members of the public in certain portions of the United States, and Kemper deals directly with said portions of the public. Advertising through various public media, including television, is an essential part of Kemper's business. The geographical pattern of Kemper's

sales of insurance is such that it is desirable for Kemper to advertise by television in the 95 market areas listed in Exhibit A. The geographical pattern of Kemper's sales of insurance is such that Kemper does not make extensive sales, and did not wish to advertise in the 35 markets listed in Exhibit B.

54. ABC is the owner and licensee of five television stations licensed by the Federal Communications Commission (hereinafter referred to as the FCC). These stations are located in New York, Detroit, Chicago, San Francisco and Los Angeles. At all material times hereinafter mentioned ABC operated one of three major television networks in the United States, which consists of approximately 249 owned or affiliated television stations in the United States (hereinafter sometimes referred to as "ABC's affiliates"). ABC's primarily affiliated stations, including owned stations, are located in the markets listed in Exhibit C. Other United States affiliates of ABC are located in the markets listed in Exhibit D. ABC's gross income from the sale of television and radio time and programs less discounts, rebates and commissions to advertising agencies, was $274,523,295 in 1962. In 1961, it was $254,280,216.

55. Television broadcasting stations and television network systems, including ABC and its affiliates, in the United States are and were at all material times hereafter mentioned engaged in commerce among the several states of the United States and within the State of New York. Each station is an instrumentality through which are transmitted

programs and commercial advertising material across state and national boundaries to television viewers in the United States and foreign countries. Contracts, combinations and conspiracies in restraint of such commerce are specifically brought within the scope of the Federal antitrust laws by Section 313 of the Federal Communications Act of 1934, as amended (47 U. S. C. §313), making the Federal antitrust laws applicable to television broadcasting.

56. The commercial television industry includes four basic elements: (i) audiences, (ii) television stations, (iii) programs and (iv) advertisers.

57. Audience is that segment of the public with which a particular advertiser wishes to communicate in order to promote the sale of its products and to which the advertiser acquires access through the medium of purchasing broadcast time on TV stations. The volume, the quality and the territorial location of the audience reached by an advertiser vary according to the requirements of the particular advertiser and according to the coverage afforded by the particular stations on which the advertiser can purchase station time.

58. Television stations are TV broadcasting units which provide the technical facilities for broadcasting TV programs in various regions of the United States and which provide the advertiser with access to the audience with which it seeks to promote the sale of its products. Each TV station is licensed by the FCC, and is required by

statute and by regulation, as a condition for obtaining and renewing its license, to operate in the public interest.

59. Programs constitute the subject matter, apart from commercials and public service announcements, broadcast on the TV stations. Programs may be live, may be taped, may be filmed, and may cover a myriad of subjects, including sports, news, pictorial fiction, etc., and in fact, may consist of practically anything and everything that may appeal to the public taste. Programs are one of the two major factors that determine audience attraction. The second such major factor is the time of the day at which, and the day of the week on which, the program is televised. The most valuable time of the day is during the evening from and after approximately 6 P. M.

60. Programs are produced by local (i.e., non-network owned) TV stations, by networks, and by independent program producers. Local TV stations produce, for the most part, live programs of a local nature on a modest cost basis for telecast on a local basis. Networks produce live programs, including news programs, and filmed programs to be broadcast by their affiliated stations. Independent program producers include advertising agencies, motion picture companies, and other companies which are engaged in the production of, for the most part, filmed TV programs.

61. Advertisers ultimately provide the entire revenues earned by TV stations and program producers. Advertisers are companies engaged in one or more lines of commerce and dealing either directly or indirectly with the

public. Advertisers fall into three general categories: local, regional and national. National advertisers are those who seek to advertise their products on a national basis; regional advertisers are those who seek to advertise their products on a regional basis; and local advertisers are those who seek to advertise their products on a local basis. Each of these three categories of advertisers buy time on TV stations. TV broadcast time constitutes one of the most important media, if not the most important, for advertising.

62. TV advertising may be purchased on a sponsorship basis, or on a spot announcement basis. In sponsorship advertising the advertiser is identified with the program; the advertising message is broadcast at, or shortly after the beginning, during the course of, and at the end of the program. Spot announcements are advertisements which generally appear between programs not during a program.

63. The sale of TV station broadcast time may take several forms including sales:

(a) By TV stations or their representatives to local advertisers on a spot announcement or sponsored basis.

(b) By TV stations or their representatives to national or regional advertisers on a "spot sale" basis. The sale is usually of a short segment of broadcast time sufficient to permit the telecast of an advertising message at the time of a station break. The sale may be of a broadcast

time segment of a quarter of an hour, or more, sufficient to permit the telecast of a program over that station. Such sales of TV station time, either for spot announcements or for programs to national or regional advertisers, are known as "national spot sales." Such sales are usually subject to cancellation.

(c) By networks to advertisers on a sponsored basis. The sponsored time sale by networks is of broadcast time segments of a quarter of an hour or more to permit the telecast over the network of a sponsored program. Sales of time by networks are known as "network sales." The time sold in a network sale is broadcast time on the network's affiliated stations. For making such a sale the network keeps a substantial share of its affiliated station's time charge rate and remits to its affiliates the balance of its affiliate's time charge received from the advertiser. In order to make such network sales, the network, in most cases, acquires from its affiliates the broadcast time which is the subject of the network sale, or an option therefor.

64. The amount of program and commercial time on television stations throughout the United States available for sale to advertisers, national, regional or local is sharply limited. As of June 30, 1962, there were only approximately 464 VHF (Very High Frequency) and 84 UHF (Ultra High Frequency) commercial TV stations actually on the air, and the entry of additional competitive TV stations into the commercial TV broadcasting field has been practically foreclosed by the limited number of channel assignments that are still available in the VHF band and by the

inability of UHF stations to compete effectively with VHF stations. Thus, as of June 30, 1962 there was an upper limit of 591 commercial VHF TV stations. In many cities throughout the United States all of the available VHF channel assignments have already been allocated to TV stations, and thus additional access to television audiences is not generally possible through VHF frequencies. Approximately 80% of the television sets in use in the United States are not equipped to receive television broadcasts on UHF frequencies. So long as the number of sets equipped to receive television broadcasts on UHF frequencies remains small, there is no incentive to open and operate television stations on channels in the UHF band, and so long as the number of UHF TV stations remains small in comparison with the number of VHF band stations, there is little incentive for the public to purchase UHF sets or UHF adapters for VHF sets. The practical consequence is that entry of new TV stations or networks into the commercial TV broadcasting field in those areas which include the vast majority of the audience public in the United States has been foreclosed or severely restricted and that advertisers are forced to deal with the limited number of existing stations and networks for broadcast time in order to reach the desired audience.

65. There are only three major TV networks operating in the United States. ABC operates one of these three networks. Over 90% of the approximately 548 commercial TV stations in the United States are affiliated with at least one of the three major networks.

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66. Networks function in several capacities. They produce and sell or license programs or sponsorship rights to programs to advertisers. They purchase or acquire TV time from affiliated TV stations, including their owned stations. They sell to advertisers TV time on stations owned by them and on stations affiliated with them. They schedule programs for clearance through their affiliated stations, and in the more valuable periods of the broadcast day they determine, as a practical matter, the program content of the programs cleared through their affiliated stations.

67. The principal source of a network's earnings is the sale of the broadcast time of its affiliates. The volume of a network's revenues depends on, among other things, the sale of broadcast time of its affiliates to advertisers through the network and on the number of affiliates on which broadcast time is sold to the advertiser through the network. A network's advertising revenues also depend on the network's audience rating and this depends in part on the number of affiliates whose time is sold through the network. The greater the number of the network's affiliates which clear network programs, the higher will be the network's audience rating and the greater its revenues from advertisers for time charges for its affiliates' broadcast time. In short, acquisition of, control over, and sale of the broadcast time of stations affiliated with a network is of direct and primary concern to the network.

68. Networks compete for the acquisition of and control over the broadcast time of their affiliates with national, re-

gional, and local advertisers who seek to acquire the broadcast time of stations affiliated with the networks directly from those stations rather than through the network. Broadcast time of network affiliates sold directly to advertisers is time lost to the network, and the revenues from the sale of that time is advertising revenue lost to the network.

69. In order to acquire, control and dominate the broadcast time of its affiliates, and in order to foreclose competitors from acquisition of and access to that time, ABC has imposed certain tie-in arrangements between it and its affiliated stations and certain tie-in arrangements between it and its advertisers. These tie-in arrangements are accomplished as follows:

(a) Sales of unique programs controlled by ABC as owner or licensee and sales of the broadcast time on ABC affiliates in market areas desired by advertisers are conditioned by ABC on sponsorship by the advertisers of the desired program over, and the sale of broadcast time on, those ABC affiliates which are located in market areas not desired by the advertiser.

(b) Availability of programs controlled by ABC as owner, licensee, or otherwise, and desired by an ABC affiliate is conditioned by ABC on clearance by the affiliate of other programs and on acceptance by the affiliate of the advertiser as sponsor furnished by the network. Clearance by the affiliate of programs furnished by the network forecloses the affiliate from selling the advertising time con-

nected with the program directly to advertisers without ABC's authorization.

70. The aforesaid tie-in arrangements imposed by ABC on its advertisers and on its affiliates have resulted in contracts and combinations between ABC, its advertisers, and its affiliates which:

(a) Substantially restrain, restrict and limit competition in the acquisition, purchase and sale of the broadcast time on affiliates of ABC.

(b) Foreclose and limit advertisers from access to the broadcast time of ABC affiliates.

(c) Foreclose and limit ABC affiliates from access to advertisers and owners and licensees of programs.

(d) Divert national advertising revenues through the networks and away from the network's affiliates.

(e) Increase ABC control over and dominance of the acquisition and sale of the broadcast time of its affiliates.

(f) Coerce ABC advertisers into buying broadcast time on affiliates of ABC in unwanted market areas.

(g) Deprive the small advertisers of access to the TV audience in the more valuable TV broadcast time periods.

(h) Enable ABC to dominate and control a very substantial segment of the more valuable broadcast period of ABC affiliates.

71. In 1962 and at all material times herein, ABC was producing a live news program of approximately one-quar-

ter hour duration entitled "Evening Report." This program was produced and edited by ABC's news department, and featured Ron Cochran. It was broadcast over ABC's network throughout the United States fives days per week on a live or delayed basis between the hours of 5:30 P. M. and 7:30 P. M. local time. The program covered events of national and international significance, and featured on-the-spot reports with numerous interviews with and reports from eyewitnesses. The program was unique.

72. In 1962, ABC had cleared "Evening Report" with certain of its affiliates under the arrangements described in paragraph 69 above which foreclosed ABC affiliates from selling the broadcast time for "Evening Report" directly to advertisers; required said affiliates to accept the sponsor for "Evening Report" furnished by ABC; and required said affiliates to accept from ABC substantially less than 50% of the affiliates' published time charges for the broadcast of "Evening Report" over that station.

73. In early 1962, Kemper decided (a) to advertise over TV stations located in the 95 market areas listed in Exhibit A and (b) that sponsorship of a general interest program such as a live news program would be best suited to meet Kemper's advertising needs.

74. By reason of the facts alleged in paragraphs 64, 65, 69 and 70, Kemper was obliged to deal exclusively with ABC for the purchase of sponsorship rights to "Evening Report" and for the purchase of broadcast time on those affiliates of ABC over which Kemper desired to sponsor "Evening Report".

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75. ABC refused to sell to Kemper sponsorship of "Evening Report" and refused to sell to Kemper time for broadcast of "Evening Report" on a sponsored basis on the 95 stations affiliated with ABC located in the market areas in which Kemper wished to advertise except on the terms hereafter alleged. ABC conditioned the sale of sponsorship of "Evening Report" to Kemper and conditioned the sale of time for the broadcast of "Evening Report" on a sponsored basis on its affiliated stations serving the 95 market areas desired by Kemper, on Kemper's purchase of time to broadcast "Evening Report" on a sponsored basis on 35 additional stations affiliated with ABC and serving market areas in which Kemper did not wish to advertise. The tie-in sale of the program "Evening Report," and the tie-in sale of the time to broadcast the said program on a sponsored basis on the desired 95 ABC affiliates, with and to the sale of time to broadcast "Evening Report" on a sponsored basis in the 35 undesired market areas, was effected by ABC's informing Kemper that it would charge a rate for the broadcast time on the 95 desired stations that far exceeded the rate for the broadcast time on the total of 130 stations which included both the desired 95 stations and the undesired 35 stations. The excess of the rate for the 95 affiliates over the rate for those 95 affiliates, when tied to the undesired 35 affiliates, was unreasonable, excessive, unrelated to any cost differential to ABC, and had the effect of conditioning the sale of sponsorship rights and broadcast time on the desired 95 stations upon the sale of broadcast time on the undesired 35 stations. Such conditioning was imposed by ABC for

the purpose of achieving the restraints alleged in paragraph 70.

76. By reason of the tie-in of the sale of "Evening Report" to the sale of time on the undesired 35 ABC affiliates, Kemper, in order to buy sponsorship of "Evening Report" and time on the 95 desired ABC affiliates, was coerced into and in fact did buy time on 35 ABC affiliates located in market areas undesired by Kemper.

77. ABC's action in tying the sale of "Evening Report" and the sale of time on 95 ABC affiliates to the sale of time on 35 undesired ABC affiliates for broadcast of "Evening Report" on a sponsored basis was for the purpose, and had the effect, alleged in paragraph 70 above.

78. ABC has attempted to enforce the tie-in restraints heretofore alleged by requiring Kemper to agree to the terms of the ABC acknowledgment of order, and by attempting to enforce the ABC acknowledgment of order as a contract.

79. Said ABC acknowledgment of order restrains interstate trade and commerce in the sale of television station time, or would restrain such trade and commerce if ABC is able to enforce its provisions. By reason of such restraints said ABC acknowledgment of order violates Section 1 of the Sherman Act, 15 U. S. C. §1 and is unenforceable.

80. On January 4, 1963 Kemper informed ABC that it would not sponsor any further "Evening Report" pro-

grams on the ABC network. On January 9, 1963, ABC instituted this suit against Kemper and Kemper's agent, Clinton E. Frank, Inc.

81. This suit was instituted by ABC for the purpose of giving effect to the unlawful contracts and combinations described in paragraphs 69, 70 and 75 above of this answer, and for the purpose of and furtherance of the objectives enumerated in paragraphs 69 and 70 above. The suit seeks damages for breach of an alleged obligation on Kemper's part to sponsor "Evening Report" on the 130 ABC affiliates in the market areas listed in Exhibits A and B, which included the 35 ABC affiliates located in undesired market areas listed in Exhibit B. The said alleged obligation was obtained by coercion from Kemper in the manner alleged in paragraphs 69 and 70 above, and for the purpose and effect alleged in paragraphs 69 and 70 above. Performance of said alleged contract would have limited, restrained, and restricted competition in the acquisition, purchase and sale of the broadcast time of ABC affiliates in the manner and respect outlined in paragraph 70 above.

82. If ABC prevails in this suit, this court will have sanctioned and enforced the restraints and violations heretofore alleged in paragraphs 70 and 79.

83. As a result of the foregoing, defendants are under no liability to ABC as alleged in the First and Second Causes of Action in the amended complaint.

* * *

Appendix G

[Seventh Defense, Partial Defenses, and First and Second Counterclaims Omitted]

* * *

WHEREFORE, the defendants demand judgment:

(1) That the complaint be dismissed; and

(2) That defendant Lumbermens Mutual Casualty Company have judgment on its first counterclaim against plaintiff for the sum of $14,081.95, with interest thereon; and

(3) That defendant American Motorists Insurance Company have judgment on its first counterclaim against plaintiff for the sum of $2,485.05, with interest thereon; and

(4) That defendant Lumbermens Mutual Casualty Company have judgment on its second counterclaim against plaintiff for the sum of $59,722.64, with interest thereon; and

(5) That defendant American Motorists Insurance Company have judgment on its second counterclaim against plaintiff for the sum of $10,539.29 with interest thereon; and

(6) That defendants Kemper and Frank have judgment against plaintiff for the costs and disbursements of this action; and

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(7) That defendants Kemper and Frank be awarded such other and further relief, including judgment for such other and further damages as it may be found to have suffered, as to this Court may seem just and proper.

LORD, DAY & LORD
Attorneys for Defendants
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25 Broadway
New York 4, New York

(Verified May 23, 1963 by John W. Castles, 3d and by John N. Blackman)

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"Exhibit A" Appended to Answer

95 Markets in Which Kemper Desired to Advertise Through Television

Altoona; Albany, N. Y.*; Asheville; Atlanta*; Baltimore*; Binghampton*; Boston*; Huntington, W. Va.; Chattanooga; Cincinnati*; Detroit*; Greenville, Wash.; Holyoke; Indianapolis*; Knoxville; Lynchburg; Manchester; Mt. Washington*; New Haven*; New York*; Norfolk; Orlando; Philadelphia*; Pittsburgh*; Richmond*; St. Petersburg; Scranton; Toledo; Washington, D. C.*; West Palm Beach; York; Beaumont; Birmingham*; Chicago*; Dallas*; Decatur, Ill.; Green Bay; Houston*; Kansas City*; Little Rock*; Lake Charles, La.; Louisville; Madison; Memphis; Minneapolis*; Mobile; Nashville; New Orleans*; Oklahoma City*; Omaha; Peoria; Rockford; St. Louis*; San Antonio; Shreveport; South Bend; Tulsa*; Wichita; Wichita Falls; Denver; Phoenix; Bakersfield; Los Angeles*; Portland*; San Francisco*; Seattle*; Spokane; Buffalo*; Cleveland*; Columbus, Ohio*; Miami*; Raleigh*; Syracuse*; Grand Rapids; Sacramento; Amarillo; Baton Rouge, La.; Plattsburgh, N. Y.; Davenport; Fresno; Greensboro; Flint; Charlotte, N. C.*; Jackson, Miss.*; Milwaukee*; Providence*; Rochester*; San Diego; Utica; Alexandria, La.; Bangor, Me.; Corpus Christi; Hattiesburg; Jacksonville, Fla.; and Savannah.

---

* Indicates keymarkets for Kemper Insurance.

Appendix G

"Exhibit B" Appended to Answer

35 Markets in Which Kemper did not Desire to Advertise Through Television

Akron, Ohio; Anderson; Augusta, Ga.; Charleston, S. C.; Columbia, S. C.; Erie; Fairmont; Fort Wayne; Harrisburg, Pa.; Lebanon; Lexington; Waterbury; Youngstown; Ada; Austin, Minn.; Cedar Rapids; Des Moines; Evansville; Fargo; Grand Forks; Harrisburg, Ill.; Hays, Kansas; Hayes Center, Nebr.; Kearney; Pembina; Monahans; Albuquerque; Colorado Springs; Salt Lake City; Eugene; Klamath Falls; San Jose; Yakima; Richland; and Salina.

"Exhibit C" Appended to Answer

Markets Served by ABC's Primary Affiliates & Owned Stations

Ada, Okla.; Akron, Ohio; Albany-Schenectady-Troy, N. Y.; Albuquerque, N. M.; Amarillo, Tex.; Anderson, S. C.; Asheville, N. C.—Greenville, Spartanburg, S. C.; Atlanta, Ga.; Austin-Rochester, Minn.—Mason City, Ia.; Bakersfield, Calif.; Baltimore, Md.; Beaumont, Tex.; Binghamton, N. Y.; Birmingham, Ala.; Selma, Ala.; Biloxi, Miss.; Boston, Mass.; Buffalo, N. Y.; Cedar Rapids-Waterloo, Ia.; Charleston, S. C.; Chattanooga, Tenn.; Chicago, Ill.; Cincinnati, Ohio; Cleveland, Ohio; Colorado Springs, Colo.; Columbia, S. C.; Columbus, Ga.; Columbus, Ohio; Dallas-Ft. Worth, Tex.; Decatur, Ill.; Denver, Colo.; Des Moines, Iowa; Detroit, Mich.; El Paso, Tex.; Erie, Pa.; Eugene, Ore.; Evansville, Ind.; Fairmont, W. Va.; Fargo, N. D.;

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Flint-Saginaw-Bay City-Lansing, Mich.; Ft. Wayne, Ind; Fresno, Calif.; Grand Forks, N. D.; Pembina, N. D.; Grand Rapids, Mich.; Green Bay, Wis.; Harrisburg, Ill.; Poplar Bluff, Mo.; Harrisburg, Pa.; Honolulu, Hawaii; Hilo, Hawaii; Waliuku, Maui, Hawaii; Houston, Tex.; Huntington-Charleston, W. Va.; Huntsville, Ala.; Indianapolis, Ind.; Kansas City, Mo.; Kearney, Neb.; Hayes Center, Neb.; Klamath Falls, Ore.; Knoxville, Tenn.; Lafayette, La.; Las Vegas, Nev.; Lebanon, Pa.; Lexington, Ky.; Little Rock, Ark.; Los Angeles, Calif.; Louisville, Ky.; Lynchburg-Roanoke, Va.; Madison, Wis.; Memphis, Tenn.; Miami, Fla.; Milwaukee, Wis.; Minneapolis-St. Paul, Minn.; Mobile, Ala.-Pensacola, Fla.; Monahans, Tex.; Alpine, Tex.; Montgomery, Ala.; Nashville, Tenn.; New Haven, Conn.; New Orleans, La.; New York, N. Y.; Norfolk, Va.; Oklahoma City-Enid, Okla.; Omaha, Neb.; Orlando, Fla.; Peoria, Ill.; Philadelphia, Pa.; Phoenix, Ariz.; Pittsburgh, Pa.; Portland, Me.-Mt. Washington, N. H.; Portland, Ore.; Providence-New Bedford, R. I.; Raleigh, N. C.; Redding, Calif.; Eureka, Calif.; Richmond, Va.; Rochester, N. Y.; Rockford, Ill.; Sacramento-Stockton, Calif.; St. Louis, Mo.; Salina, Kan.; Salt Lake City, Utah; San Antonio, Tex.; San Diego (Tiajuana, Mex.), San Francisco, Calif.; San Jose, Calif.; Santa Barbara, Calif.; Scranton-Wilkes-Barre, Pa.; Seattle, Wash.; Shreveport, La.; South Bend-Elkhart, Ind.; Spokane, Wash.; Springfield-Holyoke, Mass.; Syracuse, N. Y.; Tampa-St. Petersburg, Fla.; Toledo, O.; Tucson, Ariz.; Tulsa, Okla.; Washington, D. C.; Waterbury, Conn.; West Palm Beach, Fla.; Wichita, Kan.; Wichita Falls, Tex.-Lawton, Okla.; Yakima, Wash.; Richmond, Wash.; and Youngstown, Ohio.

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"Exhibit D" Appended to Answer

U. S. Markets Served by ABC Affiliates Other Than Primary Affiliates and Owned Stations

Aberdeen, S. D.; Albany, Ga.; Alexandria, Minn.; Altoona, Pa.; Anchorage, Alaska; Augusta, Ga.; Austin, Tex.; Bangor, Me.; Baton Rouge, La.; Big Spring, Tex.; Billings, Mont.; Bismarck, N. D.; Bluefield, W. Va.; Boise, Idaho; Bristol, Va.-Johnson City, Tenn.; Butte, Mont.; Cadillac, Mich.; Sault Ste. Marie; Casper, Wyo.; Charlotte, N. C.; Cheyenne, Wyo.; Scottsbluff, Neb.; Clovis, N. M.; Columbia, Mo.; Columbus, Miss.; Corpus Christi, Tex.; Davenport, Ia.; Dayton, Ohio; Dothan, Ala.; Duluth, Minn.-Superior, Wis.; Eau Claire, Wis.; Eldorado, Ark.; Fairbanks, Alaska; Florence, S. C.; Ft. Myers, Fla.; Ft. Smith, Ark.; Grand Junction, Colo.; Great Falls, Mont.; Greensboro, N. C.; Greensville, N. C.; Greenwood, Miss.; Harlingen, Tex.; Harrisburg, Va.; Hattiesburg, Miss.; Idaho Falls, Idaho; Jackson, Michigan; Jackson, Miss.; Jackson, Tenn.; Jacksonville, Fla.; Jefferson City, Mo.; Sedalia, Mo.; Johnson City, Tenn.-Bristol, Va.; Johnstown Pa.; Joplin, Mo.; Juneau, Alaska; La Crosse, Wis.; Laredo, Tex.; Lima, Ohio; Lubbock, Tex.; Lufkin, Tex.; Macon, Ga.; Manchester, N. H.; Marquette, Mich.; Medford, Ore.; Meridian, Miss.; Midland, Tex.; Minot, N. D.; Missoula, Mont.; Monroe, La.; Muncie, Ind.; Panama City, Fla.; Parkersburg, W. Va.; Pittsburgh, Kan.; Plattsburg, N. Y.-Burlington, Vt.; Presque Isle, Me.; Quincy, Ill.-Hannibal, Mo.; Quincy, Ill.; Rapid City, S. D.; Reno, Nev.; Riverton, Wyo.; Rock Island, Ill.; Roswell, N. M.; St. Thomas, V. I.; Salisbury, Md.;

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San Angelo, Tex.; Savannah, Ga.; Sioux City, Iowa; Sioux Falls, S. D.; Springfield, Mo.; Steubenville, Ohio; Sweetwater-Abilene, Tex.; Tallahassee, Fla.-Thomasville, Ga.; Terre Haute, Ind.; Topeka, Kans.; Traverse City, Mich.; Cheboygan, Mich.; Twin Falls, Idaho; Tyler, Tex.; Utica, N. Y.; Waco, Tex.; Bryan, Tex.; Watertown-Carthage, N. Y.; Wausau, Wis.; Weslaco, Tex.; Wheeling, W. Va.; Wilmington, N. C.; Winston-Salem, N. C.; York, Pa.; and Zanesville, Ohio.

APPENDIX H

Notice of Motion to Dismiss Defense of Illegality Under the Sherman Act (Sixth Affirmative Defense)

[Same Title]

Sirs:

Please Take Notice that upon the complaint and answer herein and upon the affidavit of Donal L. Flynn, with the exhibits annexed thereto, verified the 31st day of May, 1963 and the affidavit of James C. Hagerty, verified the 28th day of May, 1963, the undersigned will move this Court at Special Term, Part I, of the Supreme Court, to be held in and for the County of New York, at the New York County Courthouse, located at Pearl and Centre Streets, in the Borough of Manhattan, City and State of New York, on the 7th day of June, 1963, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order:

1. Striking out the first, second and third affirmative defenses to the second cause of action, the fourth, fifth and sixth affirmative defenses to the first and second causes of action and the first and second partial defenses to the second cause of action pursuant to Rule 109 of the Rules of Civil Practice on the ground that the said defenses are insufficient as a matter of law.

2. Dismissing the first and second counterclaims pursuant to Rule 109 of the Rules of Civil Practice on the ground that the said counterclaims do not state facts sufficient to constitute a cause of action.

3. Striking out the answer herein insofar as it relates to the defenses of defendants' American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co. and Lumbermen's Mutual Casulaty Co., and directing the entry of summary judgment for the plaintiff against said defendants upon the causes of action set forth in the complaint and directing that the matter be referred to an Official Referee of this Court for an assessment of the amount and the extent of the damages, pursuant to Rule 113 of the Rules of Civil Practice on the ground that there is no defense to said causes of action.

4. Striking out paragraphs 8(a), (b), (c), (d), (e), (f) and (g), paragraphs 12, 13, 14, 15, 17, 18, 19, 21, 22, 23, paragraphs 25 to 50, inclusive, paragraphs 52 to 83, inclusive, paragraphs 86 to 89, inclusive, and paragraphs 91 to 101, inclusive, of the defendants' answer, pursuant to Rule 103 of the Rules of Civil Practice on the ground that the matters sought to be stricken are sham, frivolous, irrelevant, unnecessary and impertinent, and prejudice and delay the fair trial of this action.

Appendix H

And for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, New York
May 31, 1963

Yours, etc.

HAWKINS, DELAFIELD & WOOD
Attorneys for the Plaintiff
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To: LORD, DAY & LORD, Esqs.
Attorneys for Defendants
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New York 4, New York

APPENDIX I

Sherman Act §1, 26 Stat. 209 as Amended, 50 Stat. 693, 69 Stat. 282; 15 U. S. C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who

shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX J

Supremacy Clause—The Constitution of the United States, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 490

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO. FEDERAL MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARENCE FRIED,
Attorney for Respondent,
67 Wall Street,
New York, New York 10005.

FRANKLIN S. WOOD,
ROBERT G. DESMOND,
Of Counsel.

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IN THE

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OCTOBER TERM, 1966

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AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO., FEDERAL MUTUAL INSURANCE CO. and LUMBERMEN'S MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Is the decision of the State court, that a defendant in an action for breach of a written television network sponsorship agreement cannot interpose an affirmative defense of illegality of contract under § 1 of the Sherman Antitrust Act where the contract is not on its face or in itself an agreement in restraint of trade and the agreement does not have as its very object one of the restraints forbidden by the said Sherman Act, in accord with applicable decisions of this Court?

Statement of the Case

Errors in the question presented and in the statement of the case in the petition herein and the omission of pertinent facts impel a further statement by the respondent.

At the outset we direct the Court's attention to the erroneous assumption made by the petitioners in asserting, as part of the question presented, that a United States District Court had previously held in an action between the same parties that the same allegations as are set forth in the answer herein constitute a *per se* violation of the Sherman Act. The Court did not so hold. (See discussion pp. 6-7).

The action in the state court was predicated upon the breach by petitioners of a written contract of sponsorship entered into between the respondent American Broadcasting-Paramount Theatres, Inc. (now known as American Broadcasting Companies, Inc. and referred to herein as "ABC") and petitioner insurance companies (collectively referred to herein as "Kemper").

In its answer to the amended complaint Kemper alleged as a complete affirmative defense that the contract was an agreement in restraint of trade within the meaning of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1.

On motion of ABC the defense was stricken by the Supreme Court of the State of New York in a decision by Mr. Justice Samuel J. Silverman reported at 42 Misc. 2d 939 and 249 N.Y.S. 2d 481 (Petitioners' Appendix* "A").

The order striking the defense (PA "E," at pp. 40a-43a) was unanimously affirmed by the Appellate Division of the Supreme Court on the opinion of the court below (PA "E," at pp. 44a-45a).

---

* Hereinafter referred to by the prefix "PA."

After the trial of the action, wherein ABC was awarded damages in the total amount of $298,865.03 (including interest) under the contract (the deliberate and inexcusable breach of which was never seriously contested), the Court of Appeals unanimously affirmed the order of affirmance of the Appellate Division (PA "E," at 53a-55a).

The sponsorship agreement that Kemper breached (PA "F," at pp. 59a-71a and A*13-25) was entered into on August 15, 1962 after extensive negotiations commencing sometime prior to May, 1962 (RA 2, 7-8, 13-39). Under the terms thereof Kemper agreed to become a partial sponsor (alternate Wednesdays and Fridays) of the ABC evening network news program known as "Evening Report" during a 26-week period commencing October 17, 1962.

Three telecasts wherein Kemper appeared as the sponsor occurred before November 9, 1962. Kemper paid for such telecasts without objection and certainly without any suggestion that the contract was in violation of any antitrust act. Kemper did not pay for the November 9, 1962 telecast because of the facts hereinafter shown.

On November 13, 1962, after 4 of the Kemper sponsored telecasts of "Evening Report," a representative of Kemper's advertising agency orally advised ABC that Kemper was canceling its partial sponsorship of the program, and the following day a written letter of cancellation was delivered to ABC (RA 3-4; A341). Kemper's reason for said cancellation was not based upon any asserted violation by ABC of the antitrust laws; Kemper cancelled the contract because on November 11, 1962 ABC telecast a program, conducted by news commentator Howard K. Smith, entitled "The Political Obituary of Richard M. Nixon," upon which Alger Hiss appeared (RA 4). Because

---

* References to Kemper's Appendix on its appeal to the Court of Appeals are referred to herein by the prefix "A." References to ABC's Appendix on said appeal contain the prefix "RA."

of his appearance on the program, James S. Kemper, President of the Kemper Insurance Companies, publicly announced that his companies would no longer sponsor "Evening Report" and in a newspaper article appearing in The New York Times on November 16, 1962 he is reported to have said "his Companies' policy holders and others had objected to Kemper's association 'with a TV chain' which gave a platform to Alger Hiss" (RA 4-5).

On January 9, 1963, after unsuccessfully attempting to induce Kemper to resume its sponsorship, ABC instituted suit in the Supreme Court of the State of New York for breach of contract. Shortly thereafter, on January 15, Mr. Kemper issued the following press release, again without any suggestion that the contract was in violation of the antitrust laws:

> "To our policyholders, the members of our boards, and the agents who represent us, the replacement of an Armistice Day program intended to memorialize men who had died for their country in war with a program which smeared Richard Nixon, was obviously in poor taste. To present a convicted perjurer, convicted because he lied about his communist associations and activities, as a witness to the character of a man who had served his country in many capacities, was absolutely reprehensible.
>
> "The furor provided by the Hiss appearance, evidenced by newspaper editorials, letters to the editors, the condemnation of ABC by unanimous vote of the Illinois State Senate, protests by veterans organizations, the flood of letters and telephone calls on us, clearly showed the kind of image we could expect to suffer as a sponsor of an ABC news broadcast." (RA 10-11)

ABC's amended complaint (PA "F"), served May 3, 1963, set forth a cause of action for services rendered and facilities supplied in connection with the November 9, 1962 telecast of "Evening Report" and a second cause of ac-

tion for damages for breach of contract because of Kemper's refusal to sponsor the remaining 22 telecasts.

In its answer (PA "G"), served May 23 1963, Kemper pleaded six complete affirmative defenses, two partial affirmative defenses and two counterclaims.

The sixth complete affirmative defense (PA "G," at pp. 76a-89a), the only one presently involved, alleged a violation by ABC of § 1 of the Sherman Act and the allegations thereof were "practically identical" to those set forth in a complaint for treble damages and an injunction filed on the same day in an action instituted by Kemper against ABC in the United States District Court for the Southern District of New York (p. 6 of Kemper's petition).

The said affirmative defense sets forth in 13 pages and 33 paragraphs of Kemper's answer numerous allegations, completely dehors and collateral to the contract, concerning ABC's business relations and agreements with its network affiliated stations and with its advertisers, i.e., the sponsors of its network programs. In effect, Kemper in the guise of a defense to its unjustified breach of the "Evening Report" sponsorship agreement has attacked the basic foundations of television network broadcasting by interjecting matters foreign to said agreement and the breach thereof.

The principal allegations of this defense relate to three general subjects, all of which are collateral to the contract itself and thus would require the court, in adjudicating the merits thereof, to go behind the contract that is the subject of the suit, namely: (a) a description of the operations of the television network industry and the sponsoring of television programs (paragraphs 55-68); (b) ABC's agreements and arrangements with its affiliated stations and with advertisers as alleged in paragraphs 69 and 72, which Kemper states were entered into for the purposes alleged in paragraphs 69 and 70;* and (c) the negotiations

* See PA "G," at pages 84a-85a.

between ABC and Kemper's advertising agency prior to the time that the agency, on Kemper's behalf, entered into the sponsorship agreement (paragraphs 53 and 73-75).

On August 14, 1963 United States District Court Judge Irving Ben Cooper denied ABC's motion to dismiss Kemper's antitrust complaint in a decision reported at 221 F. Supp. 848 (PA "C"). The motion was made under Rule 12(b)(6) of the Federal Rules of Civil Procedure solely upon the complaint.

The sponsorship agreement which was the foundation of the State Court action had not been annexed to Kemper's complaint and was not before the District Court.

Thus the only issue to be decided was whether the allegations of the complaint concerning "the structure of the television industry insofar as it relates to the agreements made by ABC with its affiliated stations and potential sponsors" (PA "C," p. 28a) and ABC's actions during its negotiations with Kemper prior to the execution of the agreement were sufficient to state a claim for relief under the Sherman Act. It is significant that Judge Cooper prefaced his opinion with this statement:

> "This is a motion by defendant pursuant to F.R. Civ.P. 12(b) (6) to dismiss the complaint for failure to state a claim upon which relief can be granted . . .
>
> "As to Rule 12(b) (6): For purposes of such a motion, all the material allegations in the complaint are deemed true. Further, in determining the merits of the motion, it must be borne in mind that, '* * * a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' 2 Moore's Federal Practice, 2d Ed. (1962), p. 2245." (PA "C," at p. 27a) (Emphasis by the Court.)

We state emphatically that the court did not hold that the complaint alleged a *per se* violation of the Sherman Act, as indicated by Kemper in its Statement of the Case, page 7 of its petition. The court merely referred to Kemper's *contention* that the allegations of the complaint set forth conduct that was unreasonable *per se*, stating: "Plaintiffs contend . . . that these agreements [between ABC and its affiliated stations and its advertisers] were a per se violation of the Sherman Act" and "This . . . constituted, Kemper maintains, a per se violation of Sec. 1 of the Sherman Act" (PA "C," at pp. 28a and 30a). The court did not hold that the ABC-Kemper sponsorship agreement or even the conduct of ABC during the negotiations constituted a *per se* violation. After reviewing all of the allegations of the complaint, the court merely concluded: "It cannot be said, therefore, that plaintiff is not entitled to any relief if the facts as alleged can be proved and demonstrated to a certainty" (PA "C," at p. 31a).

Thereafter, on September 5, 1963 the New York Supreme Court granted ABC's motion to strike Kemper's sixth affirmative defense. The decision was *not* based upon a holding that the allegations thereof failed to state a violation of the Sherman Act, but upon the theory that even if a violation was adequately pleaded the defense nevertheless could not be interposed so as to defeat ABC's claim for damages for breach of the agreement. The court's reasoning was as follows (PA "A," pp. 3a-4a):

> (a) On its face, the ABC-Kemper agreement (a copy of which was annexed to the amended complaint (PA "F") and was thus before the State court) "is a perfectly valid one for sponsorship of the program on 130 stations" and "on its face this is not a contract having for its very object one of the restraints forbidden by the Sherman Act," such as "a contract to fix prices, or to divide territories between competitors, etc."

(b) The latest United States Supreme Court test for determining whether an antitrust defense can be asserted in an action for breach of contract is whether giving judgment for plaintiff "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act," quoting *Kelly* v. *Kosuga*, 358 U. S. 516, 520 (1959).

(c) The Supreme Court in *Kelly* v. *Kosuga, supra,* at 518 and 520, has stated that "as a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court," and to allow the defense to be interposed would be to create "a very strange class of private attorneys' general." To allow the defense would involve the same quality of capriciousness that the Supreme Court found in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 753 (1947), for the penalty would not be proportioned to the injury.

The court also remarked (PA "A," at p. 5a) that although a contract may "so violate the antitrust laws as to be unenforceable in the State courts," to disallow the defense in the present case (where the contract was not on its face an agreement in restraint of trade and where granting judgment for plaintiff would not make the court a party to carrying out an illegal restraint of trade) "would be consistent with the policy that enforcement of the federal antitrust laws should in general be in the federal courts only," a consideration that is "particularly apropos where as here defendants are actually pressing a suit in the federal court for relief under the antitrust laws." In the federal court action, it was stated, the Kemper Companies, "if entitled to it, can get full relief, bearing a rational relationship to the damage if any that they may have suffered," and there is "also an obvious advantage in not litigating these long drawn-out and expensive antitrust questions in two courts."

Summary of Argument

Under the tests set forth in Rule 19 of the Rules of this Court, it is clear that Kemper's petition for a writ of certiorari should be granted only if the federal question that Kemper has raised either has not heretofore been determined by this Court or has been decided in a way probably not in accord with the applicable decisions of this Court. The instant petition does not meet either test.

There have been numerous United States Supreme Court decisions discussing in great detail the circumstances in which a defense of antitrust illegality may be interposed and in every case but one, *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U. S. 227 (1909), this Court has held that the defense could not be interposed. The decision of the state court is perfectly consistent even with the *Continental Wall Paper* case for it was held that the contracts therein were "essential parts of an illegal scheme . . . and which had for their object . . . illegal ends," and a prior case wherein the defense had been disallowed was distinguished on the ground that the contract therein was "not in itself illegal." *Id.* at 261 & 260. These tests were applied by the state court when it held that the ABC-Kemper sponsorship agreement was "on its face . . . a perfectly valid one" and that "this is not a contract having for its very object one of the restraints forbidden by the Sherman Act" (PA "A," at p. 4a).

Furthermore, the present case cannot be distinguished in any way from the most recent case on this subject, *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), and the state court correctly applied this decision in striking petitioners' affirmative defense.

The petition does not raise an issue of federal supremacy, for in striking the defense the state court applied a rule of law announced by this Court and not a New York State rule inconsistent therewith.

The result of the decision of the state court (which is consistent with the policy that enforcement of the federal antitrust laws should in general be in the federal courts only) was to thwart Kemper's attempt to transform a relatively simple breach of contract action into an antitrust proceeding, but it did not have the effect of depriving Kemper of its day in court. The merits of the antitrust issue will be determined in Kemper's treble damage action now pending in the United States District Court for the Southern District of New York, and if Kemper can prove ABC's violation of the Sherman Act it will be able to obtain compete relief in the said federal court action, *i.e.*, treble damages.

The arguments in the petition addressed to the *merits* of the affirmative defense (pp. 10-18) are completely irrelevant because the decision of the state court which the petition asks this Court to review did not involve the merits of the affirmative defense, *i.e.*, whether the facts alleged constituted a violation of the Sherman Act, but only the question of whether the defense could be interposed in order to defeat ABC's claim for damages for breach of contract. As in *Kelly* v. *Kosuga, supra,* where this Court stated in a footnote (358 U. S. at 518), "Without deciding the point, we shall assume that the petitioner's allegations duly charged a violation of the Sherman Act," the New York court assumed that the allegations of the defense duly charged a violation of the Sherman Act.

POINT I

The decision of the state court striking petitioners' affirmative defense is in full accord with the applicable decisions of this Court.

Rule 19 of the Rules of this Court states, in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The "question presented" at page 3 of the petition herein offers no reason to this Court for the exercise of its sound judicial discretion in favor of granting the writ. The state court has decided no federal question of substance not heretofore determined and certainly has not decided the question contrary to applicable decisions of this Court. On the contrary, the decision of the state court is in full accord with each and every one of the numerous decisions by this Court concerning the federal question as to the availability to a defendant in a contract action of an affirmative defense based upon alleged violations of the antitrust laws.

This Court first considered the availability of the defense of illegality under the antitrust laws in an action on a contract in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902), which was a suit to recover the price of pipes sold to the defendants. It was alleged as an affirmative defense that plaintiff was a "combination" consisting of various manufacturers and sellers of sewer and drainage pipe that had pooled their interests and agreed to maintain prices in excess of market value, said combination being in violation of the Sherman Act.

The Court, at 547-48, quoted with approval the statement in *Dennehy* v. *McNulta*, 86 Fed 825, 827 (7th Cir. 1898), that the mere fact that the plaintiff's "general business is illegal" (which is, in essence, the contention made by Kemper in paragraphs 69 and 70 of its answer, PA "G," at pp. 84a-85a)

"cannot serve, ipso facto, to create default or liability on its contracts generally; nor can such fact be in-

> voked collaterally to affect in any manner its independent contract obligations."

Accordingly, it was held in *Connolly* that although the court would not "lend its assistance" to the enforcement of an illegal contract (*id.* at 549) the defense of illegality was unavailable because the contract of sale was "collateral" to the alleged illegal combination. As to the latter the court said (*id.* at 551):

> "That combination may have been illegal, and yet the sale to the defendants was valid."

Seven years after *Connolly* this Court considered *Continental Wall Paper Co.* v. *Louis Voight and Sons Co., supra,* and in a five to four decision upheld the defense in an action for the unpaid balance on an account for merchandise sold and delivered to defendant.

The defendant, a wall paper jobber and wholesaler, alleged in his affirmative defense that plaintiff was a "combination" formed by over 30 companies manufacturing 98% of the wall paper sold in the United States for the purpose of monopolizing the wall paper business, eliminating competition and fixing prices. All of the output of these manufacturers was sold through plaintiff, and was sold only to those jobbers and wholesalers who were willing to sign a requirements contract (1) obligating them to buy from no one but the members of the combination and (2) requiring them not to sell the goods for prices less than those specified by plaintiff. *Id.* at 240-41 and fn. at 246-47.

Not only was the very existence of plaintiff illegal under §1 of the Sherman Act as a "combination . . . in restraint of trade," but the purchase agreement pursuant to which plaintiff had sold the wall paper to defendant was inherently illegal because of the two aforesaid provisions. The agreement stated that "the jobber will purchase [from

plaintiff] the entire requirements of the jobber in his business of selling wall paper" (*id.* at 246-47, fn.), and thus was illegal *on its face.* Furthermore, it was illegal on its face because of the aforesaid price fixing provisions contained therein.

Mr. Justice Harlan, writing for the majority, distinguished the *Connolly* case (in which he also wrote the majority opinion) on the ground that the defendant's contract therein "was to take certain goods at an agreed price, nothing more, and was not *in itself illegal.*" *Id.* at 260, emphasis added. It was not "part of" an illegal "general plan or scheme" and it was "wholly collateral to and independent of the agreement under which the combination had been previously formed." *Ibid.*

The Continental Wall Paper Co. purchase agreements (one of which had been signed by defendant), on the other hand, were held "to be based upon agreements that were and are essential parts of an illegal scheme . . . and *which had for their object* . . . to accomplish the illegal ends for which the Continental Wall Paper Co. was organized." *Id.* at 261, emphasis added. To award judgment for plaintiff, it was stated, under the facts and circumstances presented in that case would "give the aid of the court in making effective the illegal agreements that constituted the combination." *Ibid.*

Mr. Justice Silverman's decision in the instant case reflects this rule and theory for he stated that the ABC-Kemper agreement "on its face . . . is a perfectly valid one for sponsorship of the program on 130 stations" (equivalent to Mr. Justice Harlan's aforesaid characterization of *Connolly* as involving a contract "to take certain goods at an agreed price . . ., not in itself illegal") and that it is "not a contract having for its very object one of the restraints forbidden by the Sherman Act" (PA "A," at p. 4a).

The *Continental Wall Paper* case was distinguished in another major Supreme Court case, *D. R. Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165 (1915), which was an action brought in a Georgia state court for the amount due for glucose sold to defendant. There, as here, the answer of one of the defendants was stricken on motion and a judgment was entered for plaintiff, which was affirmed by the Georgia Court of Appeals (11 Ga. App. 588).

The defendant, relying upon *Continental Wall Paper*, alleged that plaintiff was a combination of glucose manufacturers organized for the purpose of monopolizing "all dealings in such products" in violation of the Sherman Act. Mr. Chief Justice White, speaking for a unanimous court, held that the defense of illegality could not be interposed, for "courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so." *Id.* at 172. It was stated that the ground for the decision in *Continental Wall Paper* was the *inherent illegality* of the contract which was sought to be enforced (*id.* at 177) whereas the provisions of the contract sought to be enforced in the case then before the court were "intrinsically legal." *Id.* at 173.

It is significant that in that case the defendant argued that although the provisions of the contract

> "were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination interested in inserting such conditions as an efficient means of sustaining its continued wrong-doing and therefore giving power to accomplish the baneful and prohibited results of its illegal organization. . . ." (*Id.* at 173)

This is essentially the same theory advanced by Kemper in its sixth affirmative defense, for although it must admit

that the contract is not illegal on its face it contends (a) that the ABC television network is an illegal entity because the ABC affiliates—the stations over which the network programs are carried—are bound to the network by virtue of illegal tying arrangements which, it is stated in paragraph 70 (PA "G," at p. 85a), have resulted in "combinations" between ABC and said affiliates having the purpose and effect of restraining competition in the manner alleged in said paragraph and (b), as alleged in paragraphs 77 and 81, ABC's sponsorship agreement with Kemper was imposed for the allegedly illegal purposes alleged in paragraphs 69 and 70 (PA "G," at pp. 88a-89a and 84a-85a). In other words, Kemper, like the defendant in the *D. R. Wilder Mfg. Co.* case, is relying upon a claim of collateral illegality in order to defeat its obligations under a contract that is not *itself* illegal. This approach was rejected by a unanimous Supreme Court in *D. R. Wilder Mfg. Co.*

Also significant is the observation in *D. R. Wilder Mfg. Co.* that the Sherman Act provides comprehensive remedies for its enforcement, which generally exclude the right of individuals to accomplish said enforcement. It was stated, at 174-75, quoting from *Farmers' & Mechanics' Nat. Bank* v. *Dearing,* 91 U. S. 29, 35 (1875), that "where a statute creates a new offense and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." Thus, the Court recognized that limitations must be placed upon the ability of a defendant in a contract action to assert the defense of illegality under the antitrust laws for the reason that such defense is an indirect sanction that conflicts with the general purpose of the antitrust statutes of limiting enforcement thereof to the specific remedies provided in the statutes themselves.

The aforesaid rules were crystallized in *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248 (1925), wherein this Court,

citing the *Connolly, Continental Wall Paper Co.* and *D. R. Wilder Mfg. Co.* cases, *supra,* held at page 252:

> "It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. *With that exception the remedies which the Act provides for violations of it are exclusive.*" (Emphasis added.)

The statements set forth in the *D. R. Wilder Mfg. Co.* and *A. B. Small Co.* cases concerning the remedies for antitrust violations were reiterated in 1947 in *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U. S. 743 (1947), an action brought in a Florida state court for the balance due on a running account for goods sold and delivered.

The principal defense to the action was that plaintiff violated the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a, by selling goods to others at prices that discriminated against defendant, primarily through the granting of quantity discounts to defendant's competitors.

In addition, defendant brought an action against plaintiff for treble damages in the United States District Court for the Southern District of Florida (*id.* at 752) and to that extent the case is quite similar to the present case.

In affirming the decision of the Supreme Court of Florida disallowing the affirmative defense of illegality, this Court, in an opinion by Mr. Justice Jackson, stated at 750:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 33 Stat. 731, 15

U.S.C. § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.

"It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act."

Because the statute did not expressly make the contract of sale illegal and the purchase price uncollectible the Court held that there was no necessity to allow defendant to plead the defense of illegality and that defendant had an adequate remedy under the statute by reason of his treble damage action in the federal court, the remedy "Congress intended." *Id.* at 751-52.

Mr. Justice Jackson concluded by stating, at 757:

"We have assumed for the purposes of this case that petitioner could establish that the prices respondent charged were discriminatory so that they violated the Act. *But if petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by the same evidence.* For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination. *No reason suggests itself why Congress should have intended a remedy by which the victim of discrimination could recover by defense only one-third of what he could recover, on the same proof, by offense. The inducement of thrice the damages suffered may bring the sufferer to aid in enforcement of the statute.* To assure his

> help, however, it would hardly be thought appropriate to offer him the choice of taking only one-third that amount. Since the remedy embodied in petitioner's second theory would be but a weak one-third shadow of the one Congress expressly gave, *we cannot see the need for judicial reduplication in miniature.*" (Emphasis added.)

This reasoning applies equally to the present case, for if Kemper has been damaged it can recover triple the amount of its damages in the Federal Court, to which it has already addressed its alleged grievance.

Also, the Court (citing *Connolly, D. R. Wilder Mfg. Co.* and *Continental Wall Paper Co., supra*) stated at 755-56 that where a contract "has as its object" illegal ends, the defense of illegality of contract can be interposed for "if, in order to prove his own case, the plaintiff proves his violation of law then no court will aid the plaintiff to recover"; however the courts will not allow the defense "when the contract sued upon is not intrinsically illegal." It is manifest that these principles were applied, and applied correctly, in the decision of the state court in the present case.

The most recent opinion by this Court on the subject is *Kelly* v. *Kosuga, supra,* the principal case relied upon by the state court (PA "A," at pp. 3-4a).

The plaintiff brought an action in the United States District for the Northern District of Illinois to recover the balance due on the purchase price of 50 cars of onions. Defendant's affirmative defense that the agreement was in violation of Section 1 of the Sherman Act was stricken and summary judgment was granted for the plaintiff.

Plaintiff and defendant were engaged in the marketing of onions. The defendant, who was also a grower of onions, alleged that plaintiff controlled approximately 600 cars of onions in the Chicago area and had threatened

to deliver them on the futures exchange "for the purpose of depressing the futures price and the cash market price of onions" unless defendant and the other growers purchased a large quantity of the onions controlled by plaintiff. *Id.* at 517.

Defendant and the other growers were fearful that dumping such a large quantity of onions on the market would cause them considerable loss and it was agreed that the growers would purchase 287 of the aforesaid cars of onions; plaintiff and the growers, including the defendant, agreed not to deliver any onions on the futures market for the remainder of the current trading season. It was alleged that this transaction was entered into by plaintiff " 'for the purpose of creating a false and fictitious market condition,' and 'to fix the price of onions and limit the amount of onions sold in the State of Illinois.' " *Ibid.*

Defendant purchased 50 of the cars of onions, took actual possession of 13 of said cars and then repudiated the agreement; plaintiff sold the remaining cars for defendant's account and sued for the unpaid purchase price less the amount that it obtained from the sale of the remaining cars.

Mr. Justice Brennan, on behalf of the majority of the Court, stated at page 518 that "the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court," and he remarked that in *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co., supra,* "the Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction" and that "the federal courts should not be quick to create a policy of non-enforcement of contracts beyond that which is clearly the requirement of the Sherman Act." 358 U. S. at 519. He added, at 520:

> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws,

as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general."

After referring to the "narrow scope in which the defense is allowed in respect of the Sherman Act" and commenting on the limiting effect upon *Continental Wall Paper* of the Court's subsequent unanimous decision in *D. R. Wilder Mfg. Co.*, Mr. Justice Brennan held that the defense will not be allowed "past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act" (358 U. S. at 520), and he concluded:

> "Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of 'divisibility' or some other verbal formula may well be circular, see 6 Corbin, Contracts, § 1520, in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, *we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question.*" [Emphasis added.]

Thus, the Court reasoned (although it conceded that its analysis "may well be circular") that the part of the agreement providing that the parties would not deliver any of the onions on the futures market for the remainder of the season was divisible or separable from the other parts of the agreement and that by allowing plaintiff to recover the purchase price the Court would not "itself be enforcing

the precise conduct made unlawful by the Act''—the Court would not be "a party to the carrying out of one of the very restraints forbidden by the Sherman Act.'' *Id.* at 520.

A significant aspect of this decision is that it was extremely difficult to separate the illegal part of the contract—the non-delivery agreement—from the legal part of the contract, *for defendant had purchased the onions for the sole purpose of securing plaintiff's promise not to deliver its onions on the futures market.* The defendant, a grower of onions, was coerced into buying 50 cars of onions controlled by the plaintiff in order to protect the market price of onions in the Chicago area and, as defendant alleged, this had the effect of creating false and fictitious market conditions, fixing the price of onions and limiting the amount of onions sold in the State of Illinois. It was, therefore, open to argument that the agreement was *in toto* one in unreasonable restraint of trade within the meaning of Section 1 of the Sherman Act; but nevertheless the Court held that it did not fall within "the narrow scope in which the defense [of illegality] is allowed in respect of the Sherman Act.'' *Ibid.*

The key factor of the *Kelly* case is that the part of the agreement sought to be enforced—the purchase and sale of onions—was not illegal on its face or, in the language of Mr. Justice Harlan in the *Continental Wall Paper Co.* decision, it was "not in itself illegal.'' Paragraph 3 of the Complaint alleged that on or about December 17, 1955 defendant had purchased 50 carloads of onions from plaintiff, and annexed to the Complaint as Exhibit "A'' was a photostatic copy of a memorandum of agreement of purchase that merely recited the sale of said onions and the price. *Kelly* v. *Kosuga,* Record on Appeal, Appellant's Appendix, page 6.

The affirmative defense in the Amended Answer alleged that on December 11, 1955 plaintiff agreed with defendant and the other onion growers "that if they would purchase

a portion of said 600 carloads of onions, the plaintiff . . . would not deliver any onions on the futures market for the balance of the '55-'56 trading season." *Id.* at page 14. It was at this December 11, 1955 meeting and at a subsequent meeting on December 17, 1955 that defendant and other growers agreed to purchase from plaintiff 287 carloads of onions. *Id.* at page 15.

Thus, plaintiff's threat to deliver its onions on the futures market forced defendant to enter into the agreement of purchase and sale and its commitment not to deliver said onions was the inducement for said contract, but neither the threat nor the commitment formed a part of the agreement upon which the Complaint was based. Similarly, the "coercion" alleged in paragraphs 75 and 76 of Kemper's affirmative defense (PA "G," at pp. 87a-88a) did not form a part of the agreement that ABC sought to enforce. In both the *Kelly* case and the present case had the defense been allowed the court would have been required to go behind a contract valid on its face in order to engage in a "collateral method of enforcement of the antitrust laws" (*id.* at 520), a practice that this Court has never sanctioned.

It is difficult to distinguish the facts in *Kelly* v. *Kosuga* from those present in the instant case. In *Kelly* a written agreement provided for the purchase of 50 carloads of onions. In the present case the written agreement provides for telecasts over a period of 26 weeks. In *Kelly* defendant asserted that it was *coerced* in purchasing 50 carloads of onions that it did not want, which is similar to Kemper's claim. In the present case Kemper paid for 3 telecasts, refused to pay for the 4th telecast, and would not permit its commercials to be telecast during the balance of the programs. In *Kelly* when defendant breached the contract after receiving 13 of the carloads the remaining onions were removed from storage and were sold for the defendant's account and the defendant was held liable

for the resultant damages. In the present case when Kemper repudiated the contract ABC sold off to others the sponsorships reserved for Kemper and was awarded damages for the difference between the amount received and the contract price. The situation in both cases is almost identical.

On page 3 of its petition Kemper points out that it did not receive any benefit from its sponsorship of the "Evening Report" telecasts after the date of its cancellation of the contract, and on page 22 Kemper attempts to distinguish the *Bruce's Juices* case by referring to the fact that the defendant therein "was seeking to avoid payment for what it had already received, whereas in the instant case ABC is seeking to recover for post-cancellation programs that were not broadcast under Kemper's sponsorship." Its argument, both in the state courts and in its petition herein, is that although the defense might be disallowed when it is interposed for the purpose of preventing a defendant from acquiring plaintiff's goods or utilizing plaintiff's services without paying for them, it should not be disallowed when the defendant has not received anything under the contract.

The fact that no such distinction can be drawn is amply demonstrated by reference to the decision in *Kelly* v. *Kosuga,* for as previously stated the defendant therein actually received only 13 of the 50 cars of onions that it had agreed to take and thus received no benefit from the remaining 37 cars. After defendant repudiated the agreement, *plaintiff sold the remaining cars of onions for defendant's account* and if the only purpose of the court had been to prevent the defendant from avioding payment for something he had already received it would have allowed plaintiff to recover *only* the purchase price of the 13 cars of onions that defendant actually received; however, plaintiff was allowed to recover its damages resulting from defendant's failure to take the remaining 37 cars of onions.

Similarly, ABC is not merely entitled to recover the charges for the November 9, 1962 broadcast of the program "Evening Report" that was broadcast under Kemper's sponsorship as alleged in its first cause of action; it is also entitled under the second cause of action to recover damages because of Kemper's deliberate and willful repudiation of its legal obligation to sponsor the remaining broadcasts according to the terms of its contract.

Kemper also argues (p. 19) that the restraint upon trade alleged in its affirmative defense "is not collateral to or separable from the contract but inheres in the contract" and that the defense "expressly alleges the anti-competitive consequences that would flow from enforcement of the contract." Again, Kemper has misinterpreted the aforesaid cases for in each case the underlying illegality had anti-competitive effects (in the absence of which there would have been no antitrust violation) but this Court has held that where the contract was not itself illegal and did not have as its object an illegal restraint of trade "courts may not refuse" to enforce it "because of some indirect benefit to a wrongdoer which would be afforded from doing so." *D. R. Wilder Mfg. Co.* v. *Corn Products Co., supra,* at 172. Thus, where the contract is not illegal on its face the extrinsic anti-competitive consequences are considered collateral to the contract and separable from it. This rationale applies equally to tie-in practices, for as stated in *Hammond Ford, Inc.* v. *Ford Motor Co.,* 39 F.R.D. 604 (D.C.S.D.N.Y. Feb. 18, 1966) (not officially reported), a contract may or may not be "on its face . . . an illegal tying agreement," which is another way of saying that it may or may not be illegal "in itself." As Judge Bonsal therein stated, "cases which have found agreements on their face to be illegal tie-ins have involved clear provisions prohibiting the purchaser from buying the tied product from anyone other than the seller."

On the other hand, when the contract does not satisfy this test it should be enforced and the defendant should be restricted to use of the direct sanctions for violations of the antitrust laws provided in the statutes themselves.

Professor Milton Handler in his article entitled "Recent Developments in Antitrust Law: 1958-1959," 59 Colum. L. Rev. 843, 873 (1959), in discussing *Kelly* v. *Kosuga* as to its effect upon indirect sanctions, notes that the Court's holding "comes pretty close to sounding the death knell of this indirect sanction," and he makes the following cogent argument:

> "The difficulty with the denial of the purchase price is not merely that it is drastic and capricious. The patent misuse doctrine can be equally drastic and capricious. The trouble is that the sanction is too potent. It not only would end the business of antitrust violation; it would, as Mr. Justice Jackson pointed out in *Bruce's Juices,* end all business. Were the defense to be sustained, every suit for goods sold and delivered would be converted into an antitrust proceeding. The antitrust bar might thrive, but it is far from clear that the country itself would flourish. It is one thing to buttress the law with self-executing implementing devices; it is another to create conditions under which business cannot be carried on. It is thus encouraging that a large majority of the Court discerns the danger of overzealous antitrust enforcement."

POINT II

The decision of the state court refusing to allow petitioners to assert a violation of the Sherman Act as an affirmative defense in the breach of contract action does not violate the Supremacy Clause of the Constitution, and it does not have the effect of depriving petitioners of their right to an adjudication of the merits of the antitrust issue because petitioners can obtain full relief in their pending federal court action if they can establish a violation by respondent of the Sherman Act.

(A)

The aforementioned opinions of this Court have pointed out that the antitrust laws provide comprehensive remedies for their enforcement, which remedies the Court in *A. B. Small Co.* v. *Lamborn & Co., supra,* at 252, characterized as "exclusive," with but one exception: Where the contract is "inherently" illegal, the antitrust laws may be interposed as an affirmative defense to an action on the contract. In other words, with that exception the criminal and civil suits instituted by the Government and the treble damage and injunctive actions instituted in federal court by private parties are the sole remedies for violation of the antitrust laws. See the discussion of *Bruce's Juices, Inc.* v. *American Can Co.* at pages 16-18, *supra,* and also *D. R. Wilder Mfg. Co., supra,* at 174-75.

Because the federal courts have exclusive jurisdiction over these direct sanctions and because this Court has limited the indirect sanction of interposing an antitrust violation as an affirmative defense in a contract action, whether instituted in a state or a federal court, to the aforesaid extremely limited circumstances, the state court remarked that "to disallow the defense would be consistent with the policy that enforcement of the Federal antitrust laws should in general be in the Federal courts only" (PA "A," at p. 5a).

Kemper has used this statement as the foundation for its contention that the state court violated the Supremacy Clause of the Constitution, Article VI, Clause 2 (pp. 3-4 and 25-29 of the petition). This argument is based upon the false premise that said court applied a "state policy against recognition of the defense of antitrust illegality," which must "give way to the federal policy against enforcement of contracts in restraint of trade" (p. 25 of the petition).

Kemper's argument totally disregards the fact that the state court based its decision almost exclusively on two decisions of *this* Court (*Bruce's Juices, Inc.* v. *American Can Co.* and *Kelly* v. *Kosuga, supra*) which disallowed the defense in both a state court and a federal court action; Mr. Justice Silverman, the Appellate Division and the Court of Appeals of New York did *not* apply a state rule of law or state policy inconsistent with federal law, but federal law as determined by this Court.

Furthermore, the courts of the State of New York have consistently followed the federal rule on this subject. For example, in *Loew's, Inc.* v. *Radio Hawaii, Inc.*, 20 Misc. 2d 587 (Sup. Ct. N. Y. Co. 1959), a case involving a tying arrangement,* the court struck an affirmative defense of

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* This case is quite similar to the present case. Plaintiff licensed 752 motion pictures to KTVR, Inc. which operated a television station in Colorado. Defendants, as sole stockholders of KTVR, Inc., guaranteed the station's full performance of the contract. Upon the station's default, Loew's Inc. brought an action against defendants, who interposed an affirmative defense alleging that the station had been required to take the whole package of 752 films, a "block booking practice" which has been held to be an illegal tie-in arrangement in violation of § 1 of the Sherman Act. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156-59 (1948).

In addition, KTVR, the "wholly owned tool of defendants," had instituted an action against plaintiff in federal court "identical with the substance and legal effect of the defenses herein interposed." 20 Misc. 2d at 588-89.

antitrust illegality in an opinion stating that "the present controversy in this litigation and on the facts here undisputed will turn on the effect of the recent United States Supreme Court decision in *Kelly v. Kosuga.*" *Id.* at 589. Similarly, in *Fleet-Wing Corp.* v. *Peas Oil Co.*, 29 Misc. 2d 437 (Sup. Ct. Erie Co.), aff'd 14 A. D. 2d 728 (4th Dept. 1961), the court struck an affirmative defense of illegality in an opinion stating, at 439-40:

> "An affirmative defense charging violation of the antitrust laws must be struck down upon motion to dismiss unless the contract for the sale of goods is alleged to be an integral part of the illegal conspiracy. The contract must *in itself* carry out the terms of the illegality and be *part and parcel* of the violations to allow the defense to stand. This is made abundantly clear by the United States Supreme Court in deciding the recent case of *Kelly* v. *Kosuga* (358 U. S. 516 [1959]) *which is controlling in the instant case.*" [Emphasis added.]

(B)

After referring to the policy that enforcement of the antitrust laws should in general be in the federal courts only, the state court in the present case added (PA "A," at p. 5a):

> "This consideration is particularly apropos where as here defendants are actually pressing a suit in the Federal court for relief under the antitrust laws. In that suit defendants, if entitled to it, can get full relief, bearing a rational relationship to the damage if any that they may have suffered. . . . There is also an obvious advantage in not litigating these long drawn out and expensive antitrust questions in two courts."

This is a point of considerable significance, for when a plaintiff suing on a sales agreement or an agreement for

the performance of services is faced with a defense of illegality under the antitrust laws, he is placed at a tremendous disadvantage. Antitrust issues are usually complicated, involving among other things considerable pretrial discovery, and if the defense of illegality is as a general rule allowed it could be used by defendants as a dilatory tactic, as an instrument for harassment and for the purpose of causing such expense to a plaintiff that he will be induced to compromise his claim on his contract.

If the raising of the antitrust issue is not merely a tactical maneuver and if a defendant honestly believes that there was a violation of the antitrust laws, he can and probably will bring (as Kemper did) a treble damage action in a federal court. Thus, if the antitrust defense is allowed in the state court action, plaintiff will be placed in the position of litigating the identical antitrust issues in two different courts. This would violate the general rule against multiplicity of suits and create confusion because the determination of the antitrust issues in the state court proceeding would have no effect whatever upon the ultimate determination of plaintiff's liability, if any, for violating the antitrust laws; the federal court would not be bound by the state court's decision on the antitrust issues. *Lyons* v. *Westinghouse Electric Corp.*, 22 F. 2d 184 (2nd Cir.), cert. den. 350 U. S. 825 (1955).

The effect of the Supreme Court rules restricting the use of the defense is especially salutary in the light of these considerations. If the contract or the part thereof that plaintiff seeks to enforce is "in itself illegal" or if it has as its "object . . . illegal ends" (*Continental Wall Paper Co., supra*), the state court can entertain the defense and refuse to enforce the contract without becoming involved in long and complicated antitrust litigation. But where, as in *Kelly* and the present case, the Court would

have to go behind the contract in order to determine whether there has been a violation of the antitrust laws, the defendant should be left to his remedy of a federal court treble damage action.

ABC, of course, denies that there was any tie-in or coercion in connection with the negotiation of the contract herein and has vigorously defended its position in the federal court, but the merits of the case are not germane to the basic pleading question involved herein. In any event, if in its federal court action Kemper can prove ABC's violation of the Sherman Act then under its theory of the case it will be entitled to judgment against ABC for treble damages based upon ABC's time charges for the network stations that Kemper allegedly did not want, together with counsel fees. It will have its day in court and if it prevails it can in effect obtain a repayment of part of ABC's state court judgment, trebled.

POINT III

The cases cited by petitioners do not support their contention that the state court should have allowed them to interpose a defense based upon the Sherman Act.

(A)

As a preliminary matter, it must be noted that the main thrust of the petition appears to be that the affirmative defense pleads a violation of the Sherman Act and, *ipso facto,* the state court should not have stricken the defense. It is apparent, therefore, that Kemper has completely misconceived the nature and effect of both the holding of the state court and the previously discussed decisions of this Court, which were in no way related to the merits of the antitrust questions.

For example, in *Kelly* v. *Kosuga, supra,* the court stated in a footnote appearing on page 518:

> "Without deciding the point, we shall assume that the petitioner's allegations duly charged a violation of the Sherman Act."

Similarly, the decision of the state court in the instant case (which, as previously stated, was rendered subsequent to the federal court decision denying ABC's motion to dismiss Kemper's antitrust complaint containing allegations practically identical to those set forth in its state court affirmative defense) was not concerned with the merits of Kemper's allegations. The issue before the court, which was the same issue decided in each of the aforesaid decisions of this Court, was simply whether, assuming a violation of the antitrust laws was adequately pleaded, the defendant would be allowed to interpose the violations of the antitrust laws in order to defeat the plaintiff's cause of action on the contract.

Under the section of its petition entitled "Reasons for Granting the Writ" Kemper has argued at great length (pp. 10-18) that ABC has violated § 1 of the Sherman Act by imposing a "must-buy" policy upon Kemper which required Kemper to sponsor the program over a specified lineup of television stations, and it relies heavily on Law Review articles and Congressional Committee reports which, of course, have no probative or evidentiary value. Although it is clear as aforesaid that the merits of Kemper's claim are not an issue on this application and that Kemper's arguments in its petition with respect thereto are thus completely irrelevant to the question which Kemper seeks to have this Court review, we would be remiss in failing to call to the Court's attention the following.

(i) The defense does not allege that ABC imposed a "must-buy" policy on Kemper. It alleges in paragraph 75

that ABC informed Kemper "that it would charge a rate for the broadcast time on the 95 desired stations that far exceeded the rate for the broadcast time for the total of 130 stations which included both the desired 95 stations and the undesired 35 stations," and that the alleged "excess" rate was "unrelated to any cost differential to ABC" (PA "G," at p. 87a). Thus, it is not alleged that ABC refused to allow Kemper to sponsor the program over the 95 "desired" stations unless Kemper would agree to take the 35 "undesired" stations and that Kemper had to take all 130 stations, which is the "must-buy" practice discussed in the said Law Review articles and Congressional Committee reports. Indeed, the "must-buy" practice criticized in said documents was specifically referred to as a practice engaged in by the other two major television networks, NBC and CBS. Kemper has failed to point out, for example, that in *Network Broadcasting,* Report of House Committee on Interstate Commerce, H. R. Rep. 1297, 85th Cong., 2d Sess. (1958), it was stated at page 497 that ABC "never had a regular 'must buy' group of stations in its television operations," and at pages 524-25 the Committee's report recommends the elimination of the NBC and CBS "must-buy" requirements or, in the alternative, a "modification of the practice along the lines of the ABC requirement," such as

> "a minimum dollar requirement (the present ABC practice); a minimum number of stations; or a minimum percentage of the total network (as measured by the aggregate of station rates or of station circulation)."

(ii) "Evening Report" was a multi-sponsored program telecast five evenings per week under the sponsorship of various advertisers, and at the time Kemper expressed an interest in becoming a partial sponsor of the program it was then being telecast over a specific lineup of ABC network stations. In essence, Kemper is complaining that

ABC would not allow it to sponsor the program over a lineup of stations different from the lineup of stations then carrying the program under the sponsorship of all of the other "Evening Report" advertisers, which raises numerous issue as to the reasonableness of ABC's alleged "coercion." For example, it was stated in *Network Broadcasting*, *supra*, at page 501:

> "When two or more advertisers are sponsoring a program or program series, certain problems arise if the lineup of stations is different for the individual advertisers. Unordered stations must be 'cued' by electronic signal to delete the commercial message in the program or program segment for which they are not ordered. In connection with programs having different days of the week (e.g., daytime 'strip' programs)* arrangements must be made with the advertiser or advertisers to make the program available to unordered stations on a sustaining basis, whenever possible. If opening and closing 'billboards' are used, they must take into account the fact that all of the sponsors may not have their messages on all of the stations. More important, individual stations that are not ordered by all or the majority of the advertisers may be reluctant to accept the program."

The Report recommended that the Federal Communications Commission should prohibit the "must-buy" practice of NBC and CBS but even this practice (which ABC does not engage in) was considered reasonable under some circumstances, for with the above considerations in mind the Report recommended, at page 527:

> "In the course of rulemaking, the Commission should consider the desirability of an exception in the case of multiweekly programs sold in small time segments to a substantial number of different advertisers."

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* Or, as another example, "Evening Report."

This, of course, is a description of "Evening Report."

(iii) Because the aforesaid allegations of paragraph 75 of the answer do not predicate the alleged tie-in upon a refusal to sell the tied product or service (a "must-buy" practice) but instead rely upon a tie-in accomplished through use of pricing differentials, the defense raises many of the same issues ruled upon in *United States* v. *Loew's, Inc.*, 189 F. Supp. 373, 386, 389-91, 395-97 (D. C. S.D.N.Y. 1960), aff'd 371 U. S. 38 (1962) with respect to, *inter alia*, the offering of "unit prices" in addition to the package price, cost and other justification for the package price, the right of a seller to refuse to allow a package price discount when the buyer does not wish to purchase the entire package and the right of a seller to charge a higher price per unit when the purchaser wants to select only the better units in the package. These extremely relevant issues are not remotely alluded to in the petition, and thus Kemper's discussion of the merits of its affirmative defense is extremely misleading.

These are but a very few of the many substantive issues raised by the affirmative defense (and Kemper's federal court complaint), all of which should be tried, if at all, in the pending federal action.

(B)

In addition to its irrelevant argument with respect to the merits of the affirmative defense, Kemper has cited various decisions addressed to the issue of whether the defense can be interposed, and it places great reliance upon *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753 (6th Cir. 1965), cert. den. 382 U. S. 820 (1965).

Kemper's apparent position is that this Court should grant certiorari if for no other reason than the existence of this decision, for it states at page 23 of its petition that review of the state court decision by this Court "is necessary in order to resolve the conflict" between said decision

and the decision in the *Associated Press* case. However, this is not a Supreme Court decision* and Rule 19 of the rules of this Court refers only to (a) a conflict between a state court decision and applicable Supreme Court decisions and (b) conflicts between United States Courts of Appeals. There is no third category, *i.e.*, conflicts between state court decisions and decisions of a United States Court of Appeals (even if a conflict did exist).

The inescapable fact is that the decision of the state court does not conflict with any decision of *this* Court, and thus the petition should be denied.

Furthermore, Kemper's emphasis on this case is entirely misplaced, for as compared to the present case its dissimilarities are more marked than its similarities.

In the first place, the pleading question here was never raised and the judgment in that case was rendered after a trial on the merits.

Secondly, one of the principal distinguishing factors is that this case was an action for breach of contract in a *Federal* court in which the defendant raised the antitrust issue in the form of both an affirmative defense and a counterclaim for treble damages. Thus, the issue was capable of being decided in one forum—the forum to which enforcement of the antitrust laws is limited—and in one proceeding, thereby avoiding the problem of multiplicious litigation of antitrust issues inherent in Kemper's position in the present case. See *Bruce's Juices* v. *American Can Co., supra.*

The court could have ignored the tie-in issue raised by the affirmative defense, but it would have been required to

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* The fact that this Court denied certiorari is of no significance. The denial of a petition for a writ of certiorari "imports no expression of opinion upon the merits of the case" and "does not imply approval of anything that may have been said by the lower court in support of its decision." *Agoston* v. *Pennsylvania*, 340 U. S. 844 (1950).

evaluate and pass upon this identical issue in the counterclaim, which the defendant had a clear right to interpose. On the other hand, the decision of Mr. Justice Silverman, as unanimously affirmed by both the Appellate Division and the Court of Appeals, gave due recognition to the fact that the antitrust issue raised by Kemper in its sixth affirmative defense also was raised in Kemper's action against ABC then pending, and still pending, in Federal court, a factor not present in the *Associated Press* case. A disallowance of the defense in that case clearly would have been anomalous and illogical because of the presence of the counterclaim; its disallowance herein was both logical and practical.

Thirdly, and perhaps even more important, is Kemper's erroneous statement on page 24 of its petition that in the *Associated Press* case the illegality did not appear "on the face" of the contract.

The Associated Press is a membership corporation, and newspaper publishers (including the defendant) were required to become members in order to utilize its news wire services. *Id.* at 755. The stipulation of facts presented at trial stated that the members were required to enter into a contract with the corporation, that "the contract *and the By-laws* of the AP constituted the agreement between the corporation and the members" (emphasis added) and that defendant became a member of the AP and entered into the standard form contract required by the By-laws.*

Section 8 of the By-laws provided that before an applicant could be elected as a member, it "shall have entered into a contract with the Corporation" providing that the corporation "shall furnish and the member shall receive and use a regular news service of the Corporation";** the

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* The relevant portions of the stipulation are set forth in the Appendix to this brief, Note (A).

** See Appendix Note (B).

standard form contract signed by defendant stated that defendant would take a "leased wire news service" of the corporation and the said By-laws were incorporated in the contract by reference.* In the aforesaid stipulation plaintiff and defendant agreed that "the leased wire news service referred to in the above contract" consisted of a general news wire ("the 'A' trunk circuit"), a financial and business news wire ("the 'D' trunk circuit") and an Ohio regional and general wire ("the Ohio Big Cities circuit"). *Id.* at 757.

The affirmative defense and the counterclaim were based upon the fact that defendant subsequently asked the Associated Press if it could take only the Ohio Big Cities circuit, eliminating the "A" and "D" circuits (and a Kentucky wire), a request that the Associated Press denied. *Ibid.*

The specific holding of the court on the merits of the affirmative defense and counterclaim was as follows:

> "We further hold that the established practice of AP in requiring appellant to receive and pay for the 'A' and 'D' wires, plus the Kentucky state wire, as a prerequisite to receiving the Ohio Big Cities wire, constituted a tying arrangement susceptible to violation of Section 1 of the Sherman Act." [*Id.* at 766]

Because the By-laws on their face contained a requirement that defendant take the "regular news service of the corporation" (consisting of the "A," "D" and Ohio Big Cities circuits) as a condition of membership and because the said By-laws were part of the contract between plaintiff and defendant, it follows that the agreement before the court was one of the type that is "on its face . . . an illegal tying agreement" (see *Hammond Ford, Inc.* v. *Ford Motor Co., supra*).

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* See Appendix, Note (C).

A fourth distinction is that a disallowance of the defense, either on the ground that it could not be interposed or on the merits, would have caused an extreme hardship to defendant.

The defendant agreed to give the AP two years' written notice of termination of the aforesaid contract and it further agreed that in the event of a sale of the newspaper it would cause the purchasers to agree in writing to fulfill the terms of the said contract. In July, 1958 defendant discontinued publication and sold its newspaper to E. W. Scripps Co.; however, it did not give the AP the required two years' notice of cancellation and Scripps did not become a member of the AP. Thus, the latter sued defendant for the weekly assessments for its wire services for the two succeeding years, amounting to $158,703.43. 340 F. 2d at 755-56.

The bulk of the court's opinion relates to the merits of the defendant's affirmative defense and counterclaim; the question of whether the alleged antitrust violation could be interposed as an affirmative defense to plaintiff's action for breach of contract was briefly discussed on page 769, wherein the court based its holding in defendant's favor on its finding that the defense had been interposed

> "to avoid paying weekly assessments for two years after appellant had ceased publication of Times-Star and had sold its newspaper."

No doubt the majority of the court felt that it would have been unjust to require defendant to pay for the AP wire service for a period of two years subsequent to the time that it sold its newspaper, when it was thus in *no position to utilize said services* in any way. A holding prohibiting defendant from asserting the defense would have required defendant to pay over $158,000 for news wire services when it no longer had a newspaper for which they could be used merely because, as a result of the sale of

said newspaper, it had not been in a position to give the required two years' notice of discontinuance, a technicality the enforcement of which the courts will attempt to avoid if at all possible.*

Furthermore, it is not without significance that notwithstanding this consideration two of the four judges who considered this issue (the Trial Judge and Circuit Judge O'Sullivan, in a well-reasoned dissent) held that the affirmative defense could not be interposed. Judge O'Sullivan's reasoning was based upon the most recent Supreme Court case, *Kelly* v. *Kosuga,* and he could find no distinction between the *Kelly* case and the case then before the court. Kemper's erroneous assumption (which is apparent from its quotation from the *Kelly* case on p. 21 of its petition) is that the defendant in *Kelly* was attempting to avoid payment for something that it had received, and Kemper implies that the sole purpose of the Court in disallowing the defense was to prevent unjust enrichment. Judge O'Sullivan, however, observed (340 F. 2d at 777):

> "It is significant that Kelly *had not received or used* the onions which were the subject of the suit. . . .
>
> "The action against Kelly was not for the price of onions which he had received and used, but was for damages for failure to take the undelivered portion

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* At first glance it may appear that defendant would have benefited from a disallowance of the defense on procedural grounds because part of the damages it thus would have been required to pay to plaintiff for breach of the illegal agreement would have been returned to it threefold under its treble damage counterclaim. However, this is definitely not the case, for the trial court *dismissed* the counterclaim on the ground that defendant had failed to satisfy its burden of proving its damages, i.e., the separate cost of the wires it did not want. The Circuit Court affirmed, holding that defendant's evidence was too speculative. *Id.* at 765 and 769. Thus, if the defense had been disallowed, plaintiff would have recovered $158,703.43 and defendant would have received nothing on its counterclaim.

of the total agreed to be purchased." (Emphasis by Judge O'Sullivan.)

Kemper points out on page 24 of its petition that although the *Associated Press* case was decided prior to the unanimous decision of the New York Court of Appeals affirming (without opinion) the order striking Kemper's affirmative defense, "that court did not attempt to reconcile its decision with that of the Sixth Circuit." It is obvious from the foregoing that there was no necessity for the Court of Appeals to write an opinion distinguishing the *Associated Press* case, for said case is not apposite both as to the facts and pleadings involved and the forum in which it was tried.

Kemper has also cited several decisions of this Court, but they are perfectly consistent with the decisions discussed in Point I, *supra*.

McMullen v. *Hoffman*, 174 U. S. 639 (1899), cited on page 19 of the petition, did not involve the Sherman Act and, furthermore, it is of the utmost significance that the contract therein was illegal on its face. The court stated, at pages 654 and 655, that the agreement "is as a whole of an illegal nature" and that it "contains utterly illegal provisions."

Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373 (1911), *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8 (1918) and *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), cited on page 20, are not apposite here, and, moreover, each of said cases was an action for an injunction against violations of or interference with an agreement that was illegal on its face.

In the most recent of said cases, *Standard Fashion Co.*, the Court affirmed a lower court decision that found a violation of Section 3 of the Clayton Act "within the four corners of the contract" (*id.* at 347), in *Dr. Miles Medical Co.* the agreements were "designed to" and had as their "sole purpose" the fixing of prices and destruction of competition (220 U. S. at 407-08) and in *Boston Store* the

action was brought to enforce a price maintenance agreement (246 U. S. at 20).

On page 20 Kemper cites three patent license cases, *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173 (1942), *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947) and *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402 (1947) and on page 22 it makes the erroneous statement that in said cases "the illegality turned on the extrinsic fact that the patent was invalid." To the contrary, each agreement on its face contained a provision that was in itself illegal.

In *Sola Electric Co.*, the court stated at the beginning of its opinion:

> "The question for our decision is whether a patent licensee, by virtue of his license agreement, is estopped to challenge *a price-fixing clause in the agreement* by showing that the patent is invalid, and that the price restriction is accordingly unlawful because not protected by the patent monopoly." (Emphasis added)

The patent license agreements in *Katzinger* and *MacGregor* also contained price-fixing clauses.

Conclusion

The decision of the Supreme Court of the State of New York striking Kemper's sixth affirmative defense, as unanimously affirmed by the Appellate Division of the Supreme Court and by the New York Court of Appeals, is in full accord with each and every relevant decision of this Court, and judged by the provisions of Rule 19 no basis appears for granting the petition for a writ of certiorari herein.

Respectfully submitted,

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APPENDIX

Containing Portions of the Record Before the United States Court of Appeals for the Sixth Circuit in *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753 (1965), No. 15,514 (Page References are to "Appendix for Defendant-Appellant")

Note (A)—Plaintiff's Exhibit 7, "Stipulation of Facts," pp. 420a and 421a:

"'9. In the year 1945, the By-laws of the AP were amended to provide that each member was required to enter into a contract with the corporation in such form as the Board of Directors should prescribe and which should provide that the corporation would furnish and the member would receive and use a regular news service of the corporation for the purpose and in the manner therein prescribed. Subsequent to the adoption of the amendments to the By-laws in 1945, the Board of Directors on January 10, 1946 prescribed the standard form of contract to be signed by each regular member of the AP. In April 1946, the Board of Directors approved an amendment to Paragraph 9 of the standard form of contract between the AP and its members. Since 1947 as such contracts were executed, the contract and By-laws of the AP constituted the agreement between the corporation and its members.

• • •

"'1. . . .

(c) In the year 1931, the Cincinnati Times-Star Company [defendant's original name], as the successor of Hulbert Taft, applied for and was admitted to membership in the AP, at which time the Cincinnati Times-Star Company, through its authorized agent, signed the Roll of Members of the AP and agreed to be bound by its charter and By-laws as a member of the AP.

"12. On or about August 4, 1948, the Times-Star entered into a contract with the AP in the standard form prescribed by the By-laws thereof, a copy of which is attached to and made a part of the complaint in this action and marked Exhibit A."

Note (B)—Plaintiff's Exhibit 6, By-laws of Associated Press, p. 401a:

"SEC. 8. An applicant for membership elected as prescribed by these By-Laws shall not be admitted to membership or be entitled to any of the rights or privileges of membership until he or it shall have signed a written assent to be bound by the By-Laws, and any amendments thereto which may be thereafter regularly adopted, and shall have entered into a contract with the Corporation which shall provide that the Corporation shall furnish and the member shall receive and use a regular news service of the Corporation for the purpose and in the manner therein prescribed. In other respects it shall be in such form and shall contain such provisions as shall be prescribed by the Board of Directors."

Note (C)—Exhibit A annexed to complaint, agreement between plaintiff and defendant, pp. 7a-9a:

"1. The parties hereby agree that during the term of this agreement, The Associated Press will furnish to the Member—barring conditions beyond the control of The Associated Press—and the Member shall publish 6 days a week, not earlier than 9 A. M. and not later than 7 P. M., Local Time, in the city of publication, a leased wire news service of The Associated Press, in whole or in part, in the afternoon newspaper known as The Cincinnati Daily Times-Star, owned by the Member and published at Cincinnati, Ohio, upon the terms and conditions hereinafter set forth.

• • •

"6. In the event that any of the terms and conditions of this agreement shall be or become contrary to or inconsistent with the By-Laws of The Associated Press, the By-Laws shall control.

"7. The provisions hereof and the By-Laws of The Associated Press constitute the whole agreement between parties hereto, and no oral modification hereof, or oral additions hereto, shall be binding."

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IN THE

Supreme Court of the United States

October Term, 1966

No. 490

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., AMERICAN MOTORISTS INSURANCE CO., FEDERAL MUTUAL INSURANCE CO., and LUMBERMENS MUTUAL CASUALTY CO.,

Petitioners,

against

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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October 11, 1966

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POINT I

Respondent incorrectly states the issue to be whether the contract is illegal on its face.

ABC phrases its version of the "question presented" in terms of whether "the contract is not on its face or in itself an agreement in restraint of trade * * *." The argument is then repeatedly made (*e.g.*, pp. 7, 8, 9, 13, 15, 21, 22, 24, 36, 40) that a contract is not inherently illegal unless the illegality appears "on its face."

Carefully omitted from ABC's statement of the "question presented" is any reference to the controlling test stated by this Court in *Kelly* v. *Kosuga*, 358 U. S. 516 (1959) and in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909): that the contract is unenforceable where its enforcement would "make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act" (358 U. S. at 520). This Court has also stated that a contract is enforceable if it is "collateral" to the illegality, but not if the illegality is "inherent" or "intrinsic" in the contract, and not if the contract is an "essential" part of the "illegal scheme" (*Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 260-261 [1909]; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 551 [1902]; *D. R. Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 173, 177 [1915]; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252 [1925]).

In short, ABC has opposed this application for certiorari by resting on the fallacious proposition that a contract can be enforced unless the illegality appears "on its face."

POINT II

The test of enforceability of a contract is whether it "carries out" the antitrust violation.

Despite ABC's constant repetition of its contention that the contract in this case is not illegal "on its face", not a single one of the authorities relied on by ABC has enforced an inherently illegal contract simply because the illegality

does not appear on its face. Nor is there a single decision that lays down a rule that the contract is enforceable if the illegality does not appear on its face. In neither the *Continental* case nor in *Associated Press* v. *Taft-Ingalls Corporation,* 340 F.2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 (1965) did the illegality appear on the face of the contract. ABC's brief misstates both of these cases. In both of those cases the contract was held inherently illegal because to enforce the contract would be to carry out the restraint. This reply brief will deal with these misstatements of ABC at greater length below.

To enforce an inherently illegal contract simply because the illegality does not appear on its face defies logic and policy. It stands on no rational basis. It would be a triumph of form over substance. If the "on its face" test were adopted, parties to virtually every unlawful agreement would be able to make the contract enforceable by simply embodying the unlawful term in some other document or by making it the subject of an oral agreement. In the contract in suit, for example, it was only necessary to omit from the contract any evidence that the 35 stations were unwanted to keep the fact of illegality from appearing on the face of the contract.

Numerous decisions of this Court have made clear that a contract is unenforceable if antitrust illegality "inheres" or is "intrinsic" in the contract, or if the contract would "carry out" the antitrust violation. It makes no difference that the fact of illegality does not actually appear on the face of the contract. See *e.g., Kelly* v. *Kosuga,* 358 U. S. 516 (1959).

ABC's labored treatment of *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), carefully omits reference to the controlling elements in that decision. At page 21 ABC states that "it was extremely difficult to separate the illegal part of the contract—the non-delivery agreement—from the legal part of the contract * * *." In fact, the non-delivery agreement, i.e. to withhold onions from the futures market, was oral, and was not incorporated by reference or otherwise in the written memorandum of the purchase agreement upon which suit was based. Thus, the key non-delivery term, on which the claim of illegality was predicated, was not even contained in the written contract.

Moreover, it is most significant that in the *Kelly* case the defendant, who was trying to avoid the contract, was an inducing cause of the antitrust restraint. There, Kelly wanted Kosuga to withhold Kosuga's onions from the futures market. In the instant case Kemper did not want the tie-in. ABC was the inducing cause of the restraint. Kemper was the victim.

Furthermore, in the *Kelly* case the restraint (the withholding of goods from the futures market) did not impinge on the defendant buyer who was resisting enforcement of the contract of sale on antitrust grounds. Thus enforcement of the contract of sale for the onions against the purchaser did not in any way subject the purchaser to the impact of the restraint of trade. That case is in marked contrast with the instant case. Here the restraint (the tying of different products together) adversely impinges directly on the purchaser, Kemper, as well as on others (see pp. 13-18, Kemper's petition). Thus, this case is a classic in-

stance where to enforce the contract would be to carry out the "very restraints forbidden by the Sherman Act" (*Kelly* v. *Kosuga*, 358 U. S. 516, 520 [1959]).

In its discussion of *Continental Wall Paper* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), at pages 12 and 13 of its brief, ABC incorrectly assumes that suit was brought on the price-fixing agreement, i.e. the requirements contract, which ABC correctly but irrelevantly notes was "illegal on its face". Suit was not brought on the price-fixing agreement. Suit was brought on sales accounts that were made up with reference to, and in execution of, the illegal combination (212 U. S. at 261-262) and which contained neither of the restrictive provisions referred to by ABC at page 12 of its brief. Thus, the sale contracts in the *Continental Wall Paper* case were not illegal on their faces, but were nevertheless inherently or intrinsically illegal because they were made up "with direct reference to and in execution of" the illegal price-fixing conspiracy (212 U. S. at 261-262).

In the other decisions of this Court, relied on by ABC, this Court enforced the contract only on a holding that the contract was "collateral" or "intrinsically legal" (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 551 [1902]; *D. R. Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 173, 177 [1915]; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252 [1925]).

In *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947) the Court held that "the violation, if there was one, is not inherent in the contract sued upon, * * * *but can only be found in different transactions which a party to the*

litigation had with third persons who are not parties'' (330 U. S. at 755-756, emphasis added).

ABC misstates *Hammond Ford, Inc.* v. *Ford Motor Co.*, 39 F. R. D. 604 (S. D. N. Y. 1966) at page 24 of its brief in an attempt to show that District Judge Bonsal recognized the test of illegality ''on its face'' and equated it with illegality ''in itself''. In fact, Judge Bonsal said no such thing, but noted that with sufficient proof a tie-in might be established by a ''course of conduct'' (39 F. R. D. at 606). Moreover, he held that the issues concerning Ford's conduct in enforcing the agreement ''require a trial for their resolution'' (*id.*).

The cases of *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173 (1942), *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947), and *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402 (1947) also applied the test of intrinsic or inherent illegality, rather than the test of whether the fact of illegality appears on the face of the contract. At page 41 of its brief ABC takes issue with Kemper's statement that in each of these cases ''the illegality turned on the extrinsic fact that the patent was invalid.'' ABC's contention is that the agreements in these cases contained price-fixing clauses which were in themselves illegal. ABC overlooks the point that under the rule of *United States* v. *General Electric Co.*, 272 U. S. 476 (1926) a patentee could lawfully fix the price of his patented article. It was only on a showing of patent invalidity, an extrinsic fact, that the agreements became inherently illegal.

It is apparent from the overwhelming weight of this authority, including the decisions relied on by ABC, that no

court has ever before adopted the rule now urged by ABC that a contract may be enforced as long as the fact of its illegality does not appear on its face. The true test is whether the illegality inheres in the contract so that enforcement of the contract would carry out the illegal restraint. In the present case the illegal restraint not only required Kemper to take what it did not want, but obviously the effect of enforcing the contract is to impinge directly on Kemper. Kemper was not the inducing cause of the tie-in. Kemper was the victim. That the unlawful tie-in inheres in the contract is obvious, because the contract is itself the tie-in agreement, and specifies both the unwanted and wanted products.

POINT III

Kemper cannot get full relief unless the issue of inherent illegality is resolved before ABC's judgment is enforced.

ABC argues in Point II that certiorari should be denied because the state court decision and judgment do not preclude Kemper from obtaining "full relief" in the suit now pending in the federal District Court.

Kemper's primary relief from a contract inherently illegal under the antitrust laws is to bar enforcement of the contract. This is the most direct, simple and effective remedy. It has been the remedy prescribed from the inception of the doctrine of inherent illegality. As early as the *Continental* case, this Court made it clear that enforcement of the contract "* * * is denied, not for the benefit of the defendant, but because public policy demands that it

should be denied without regard to the interests of individual parties'' (*Continental Wall Paper Co.* v. *Louis Voight & Sons, Co.*, 212 U. S. 227, 262 [1909]; *United States* v. *Bayer Company*, 135 F. Supp. 65, 72-73 [S.D.N.Y. 1955]).

The availability of a treble damage remedy is completely immaterial to the remedy of unenforcement (*Associated Press* v. *Taft-Ingalls Corporation*, 340 F. 2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 [1965]). In the *Associated Press* case the Court of Appeals denied Taft-Ingalls' counterclaim for treble damages while simultaneously refusing to enforce the contract. It is, therefore, plain that ABC is clearly wrong in asserting that the availability of a treble damage remedy in the District Court means that Kemper could get ''full relief'' in the District Court suit. Treble damages could never afford complete relief in a case involving a contract inherently illegal for antitrust reasons, because such a remedy would not, as effectively as nonenforcement, vindicate the public interest or policy recognized in *Continental Wall Paper* which dictates the nonenforcement of such contracts.

It is thus clear that the capacity of the District Court here to award treble damages is not the equivalent of affording Kemper ''full relief''. On the contrary, if the state court decision is allowed to stand, Kemper will be deprived of ''full relief''.

While ostensibly deferring the antitrust issue to the federal District Court the state court, by executing its judgment, will effectively foreclose the federal court from awarding Kemper its primary relief, i.e., barring the enforcement of the inherently illegal contract. Indeed, denial

of certiorari at the present posture of this case and collection of the judgment would effectively and irrevocably dispose of the issue of enforceability without any court having adjudicated the question on its merits. The decision of Special Term, Part I, does not decide that the contract is not inherently illegal. It goes no further than stating that the applicable test, i.e., whether enforcement would carry out the restraint, is not free from ambiguity in its application to this case. The emphasis in the decision on the inappropriateness of the state court as a forum for resolving the antitrust issue, on the appropriateness of the federal forum for resolving the antitrust issue, and the emphasis on the pendency of the federal suit are completely irrelevant to the substantive issue of inherent illegality. The court's emphasis of these points merely makes it clear that the decision did not rest on a holding that the contract was not inherently illegal, but rather on the point that the federal issue should be decided in the federal, not state, court.

Until the federal court has actually adjudicated the illegality of the contract it may be reluctant to enjoin the state court proceeding (28 U. S. C. §2283; *Avon Publishing Co.* v. *American News Company,* 143 F. Supp. 516 [S.D.N.Y. 1956]; compare *Studebaker Corporation* v. *Gittlin,* 360 F. 2d 692 [2d Cir. 1966]). Thus the federal court may not grant complete relief unless it enters judgment before the state court has enforced the contract.

We submit that the happenstance of the state court having reached final judgment before the antitrust issue has been resolved by the federal District Court should not be allowed to affect the outcome of the case. The resolution of

the issue of enforceability should not be left to the accident of the calendar position of the parallel state and federal cases. To allow the outcome of a case to turn on such accidental factors involves the very "quality of capriciousness" that the court below was ostensibly seeking to avoid.

POINT IV

Since Kemper has received no benefits from the cancelled sponsorship rights the defense of illegality is consistent with the "overriding general policy" recognized by this Court.

Kemper received none of the sponsorship rights for which ABC now seeks payment. Thus, this is unlike the numerous cases relied on by ABC wherein the plaintiff sought payment for goods sold and delivered. In its brief ABC seeks to suggest that *Kelly* v. *Kosuga,* 358 U. S. 516 (1959) did not involve goods sold and delivered. This Court was of the opposite view, for its opinion stated that "petitioner had in fact purchased the 50 cars of onions" (358 U. S. at 518) and referred to the transaction as a "completed sale" (358 U. S. at 521). ABC makes much of the fact that Kelly took possession of only 13 of the 50 carloads of onions. This Court's opinion shows that the storage charges after the sale were to be paid by the buyer and that Kelly had "withdrawn 13 cars of the onions from the designated storage places *after the sale,* but had not withdrawn the remainder" (358 U. S. at 518, emphasis added). *Thereafter* Kosuga, the unpaid seller, after Kelly's repudiation, "withdrew the remaining cars from storage and sold them for petitioner's account" (*id.*). It is clear from this that the entire 50 carloads had been delivered to the designated

storage areas, and that title had passed to Kelly on delivery in storage. The unpaid seller had merely exercised a right to retrieve the goods and sell them for the buyer's account (*cf.* Uniform Commercial Code §§2-705, 2-706).

That this Court did not treat the *Kelly* case as one involving undelivered goods is, moreover, clear from the rationale of its decision in that case, which is that the "overriding general policy" is one of "preventing people from getting other people's property for nothing when they purport to be buying it" (358 U. S. at 520). Moreover, ABC's quotation from Handler, *Recent Developments in Antitrust Law: 1958-1959,* 59 Colum. L. Rev. 843, 873 (1959), shows that Professor Handler treated *Kelly* as a case involving "goods sold and delivered".

Because the instant case does not involve goods sold and delivered, it should be apparent that Kemper is not asking the Court to provide a sanction not authorized by Congress (see ABC's brief, pp. 16-17, 19). Kemper seeks no forfeiture and is not attempting to penalize ABC by refusing to pay for what it has received. All Kemper seeks in its sixth affirmative defense is to prevent an illegal restraint from being consummated through coerced payment for what was not wanted and what was not received.

POINT V

The conflict with *Associated Press* v. *Taft-Ingalls Corporation*, 340 F.2d 753 (6th Cir. 1965), *cert. denied* 382 U. S. 820 (1965) should be resolved.

ABC has stated (brief, p. 35) that the conflict between the decision of New York's highest court in this action and the decision of the Court of Appeals for the Sixth Circuit in the *Associated Press* case is not a ground for granting certiorari. This assertion is directly contrary to the practice of this Court. In *California* v. *Taylor*, 353 U. S. 553 (1957) this Court stated at page 556:

> "We granted certiorari to resolve the conflict between the United States Court of Appeals and the California Supreme Court as to the applicability of the Railway Labor Act to a railroad owned and operated by a State."

Similarly, in Stern and Gressman, *Supreme Court Practice* (3d ed. 1962) it is stated at page 132:

> "Another valid reason for the granting of certiorari by the Supreme Court is the presence of a direct conflict between the decision of a court of appeals and that of the highest court of a state, where that conflict concerns federal questions."

ABC then attempts to distinguish *Associated Press* on the following grounds: (1) "In the first place, the pleading question here was never raised and the judgment in that case was rendered after a trial on the merits." (2) The case arose in a federal court in which the defendant counterclaimed for treble damages. (3) Illegality in the *Asso-*

ciated Press contract, allegedly, did appear "on the face" of the contract. (4) Disallowance of the defense would, allegedly, have caused an "extreme hardship." None of these attempted distinctions has the slightest merit.

(1) Obviously the question of validity of the contract was raised in *Associated Press.* The fact that there was no "trial on the merits" in this case, as there was in *Associated Press,* is the result of the erroneous decision below striking the affirmative defense.

(2) If enforceability of an illegal contract were to turn on the forum in which enforcement is sought, this would lead to forum shopping of the worst kind. The problem of "multiplicious" (*sic*) litigation should be resolved by an appropriate stay of the state court action until the antitrust issues have been resolved in the federal court.

(3) The illegality of the tie-in feature of the *Associated Press* contract most assuredly did not appear "on the face" of the Associated Press-Taft-Ingalls contract. Moreover, the By-laws which were incorporated by reference in the contract said nothing about one wire service being tied to another. They merely referred to "a leased wire news service" which the parties at trial stipulated consisted of three wires. The requirement that Taft-Ingalls take the fourth wire, the Kentucky wire, was not specified in the contract, on ABC's theory of what the contract required (brief, p. 37). Even if one contract had expressly obligated Taft-Ingalls to take the four wires, it would be no different from the instant contract which expressly obligated Kemper to take the 35 unwanted stations as well as the 95 wanted stations. If the *Associated Press*

contract was illegal "on its face", then so was the sponsorship agreement here. In neither case did it appear on the face of the contract that certain of the services therein provided for were unwanted. Moreover, the Court of Appeals relied on numerous extraneous facts to show that Taft-Ingalls did not want each of the four wire services and that Associated Press would not allow it to purchase only the desired services (340 F. 2d at 757-759, 766).

(4) It is difficult to see how Taft-Ingalls was caused any "extreme hardship" not present here. ABC sued Kemper for more than twice the amount Associated Press sued for. It seems obvious, in fact, that Taft-Ingalls' hardship was the lesser one. Taft-Ingalls could have required its successor to subscribe to the four wire services, a stipulation which its contract with Associated Press expressly required it to make. Kemper, on the other hand, was not permitted, under the terms of its contract, to resell the time made available by its termination of sponsorship.

ABC also makes the point (at p. 36): "A disallowance of the defense in that case clearly would have been anomalous and illogical because of the presence of the counterclaim * * *." ABC fails to note, however, that the antitrust defense was upheld even though the counterclaim was dismissed on the merits.

POINT VI

The tie-in effected here is indistinguishable from the "must buy" practice.

At pages 31-34 of its brief ABC asserts that the "must buy" practice is not involved here, because there was no absolute requirement but only a price differential inducing Kemper to take and pay for unwanted stations. ABC then attempts to justify its price differential.

This Court has already recognized in *United States* v. *Loew's Inc.*, 371 U. S. 38, 54-55 (1962), that a tie-in is illegal where a price differential "has the effect of conditioning" the sale of one item on the sale of another. Similarly, District Judge Cooper said in the federal case:

> "Even if plaintiffs were not required to take the additional 35 stations, but would be forced, if they chose not to, to pay a disproportionately high rate for the 95 stations, this too would constitute a violation." (31a)

POINT VII

Kemper's defense is not simply an attack on ABC's network system but is based on the illegality inhering in a tie-in contract.

ABC attempts to avoid the obvious impact of the test of inherent illegality by urging this Court that Kemper, in its sixth affirmative defense, "has attacked the basic foundations of television network broadcasting" (p. 5) and that Kemper's contention "in essence" is that plaintiff's "gen-

eral business is illegal" (p. 11). The same argument is repeated elsewhere in ABC's brief (*e.g.*, pp. 6, 14, 15). Thus ABC seeks to minimize the allegations of the answer relating to the tie-in of 35 stations to 95 stations (*e.g.*, 87a), and to characterize Kemper's answer as basically an attack on ABC's contracts with its affiliates. Precisely the opposite argument was made by ABC in the United States District Court, when ABC sought to strike the allegations relating to affiliates as irrelevant (32a). District Court Judge Cooper disposed of this argument by stating:

> "Even if the contracts between ABC and its affiliates do not constitute a tying agreement giving Kemper a cause of action, the allegations certainly have some bearing on the issues, even if only to demonstrate the economic power and leverage that ABC was able to exercise to control the tie-in." (33a)

Judge Cooper recognized that Kemper was asserting that the tie-in of 35 stations to 95 stations was illegal.

POINT VIII

Duplicate trials may be avoided by a stay of the state court action.

In its brief ABC alluded to the burden to ABC of "litigating the identical antitrust issues in two different courts" if Kemper's defense is upheld (brief, p. 29). As has already been shown in Kemper's petition (p. 28) the solution to this problem is for the state court to stay further proceedings until the antitrust issues have been resolved in the federal court. This is precisely the relief suggested by the New York Court of Appeals in an earlier case (*General*

Aniline and Film Corp. v. *Bayer Co.*, 305 N. Y. 479, 485 [1953]), and it is in some respects comparable to the "abstention doctrine" followed by this Court (*England* v. *Medical Examiners*, 375 U. S. 411 [1964]).

POINT IX

Other misstatements contained in ABC's brief

First, at page 6 of its brief ABC states that the contract involved in this action was "not before the District Court." Although the contract was not attached to Kemper's federal court pleading it was expressly referred to in the pleading, and one of Kemper's prayers for relief asked "That the alleged contract on which is based the suit by ABC against Kemper and Frank in the Supreme Court of the State of New York, County of New York, be adjudged, declared and decreed in violation of section 1 of the Sherman Act, and unenforceable, illegal and of no force and effect." District Judge Cooper denied ABC's motion to strike this prayer from the complaint (34a).

Second, ABC then proceeds to state at page 6 that the "only issue to be decided" in the federal court action concerned "the structure of the television industry * * *" and the negotiations prior to the contract. Judge Cooper never held that this was the "only issue." ABC's effort is apparently to convince this Court that the contract in suit is collateral to the illegality. We respectfully submit, however, that it is abundantly clear that the sixth affirmative defense alleges that the contract itself is an illegal tie-in contract (*e.g.*, answer ¶75; 87a).

Third, ABC is also in error in stating that District Judge Cooper did not hold that Kemper's federal complaint alleged a *per se* violation (brief, pp. 2, 7). That Judge Cooper did hold the allegations sufficient to constitute a *per se* violation is clear from the following extract from his opinion:

> "Defendant again relies on Times-Picayune for the proposition that there must be a monopoly power or dominance over the tying product in order to constitute a per se violation. However correct this interpretation of Times-Picayune may be, its effect was vitiated in Northern Pacific where the Supreme Court said 356 U. S. at p. 11, 78 S. Ct. at p. 521, 2 L.Ed. 2d 545:
>
> > "'While there is some language in the Times-Picayune opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product.'" (p. 30a)

We submit that this can only be read as a statement that Kemper need not prove ABC had monopoly power over the tying products in order to establish a *per se* violation. The correctness of Judge Cooper's decision is supported by the numerous decisions of this Court declaring tie-in agreements to be *per se* violations of the Sherman Act (*United States* v. *Loew's Inc.,* 371 U. S. 38 [1962]; *Northern Pacific R.R. Co.* v. *United States,* 356 U. S. 1, 11 [1958]; *Atlantic Refining Co.* v. *F. T. C.,* 381 U. S. 357, 371 [1965]; *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 [1953]).

Fourth, page 8 of ABC's brief contains a parenthetical statement calculated to suggest that Special Term below actually held that enforcement of the contract "would not make the court a party to carrying out an illegal restraint of trade." Special Term made no such holding. On the contrary, Special Term recognized the appropriate test, i.e., whether enforcement would carry out the restraint, and then failed to apply it (3a-5a).

Conclusion

For the reasons given, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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October 11, 1966